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A

CONCISE, PRACTICAL ABRIDGMENT

OF THE

Common and Statute Law,

AS AT PRESENT ADMINISTERED

IN

THE COMMON-LAW, PROBATE, DIVORCE, AND ADMIRALTY COURTS;

EXCLUDING ALL THAT IS OBSOLETE, OVERRULED, OR SUPERSEDED.

COMPRISING A

Series of Condensed Treatises on the different Branches of the Law,

WITH DETAILED DIRECTIONS, FORMS, AND PRECEDENTS.

AN ALPHABETICAL DICTIONARY OF TECHNICAL LAW TERMS AND MAXIMS, AND A COLLECTION OF WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

THE WHOLE ILLUSTRATED BY REFERENCES TO THE PRINCIPAL CASES IN EQUITY, AND IN THE SCOTCH, AMERICAN, AND IRISH REPORTS, AND THE MOST EMINENT TEXT WRITERS.

SECOND EDITION, RE-MODELLED, AND NEARLY RE-WRITTEN.

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A Dictionary

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TECHNICAL LAW TERMS AND MAXIMS,

AND WORDS THAT HAVE RECEIVED A SPECIAL JUDICIAL CONSTRUCTION.

BUILDING (Benefit) Society. *See ante*, vol. ii. p. 387.

BUILDING, Negligence in.[1] *See* Easement; Negligence.

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[1] If a man, by negligence and carelessness in pulling down his house, occasion damage to or accelerate the fall of his neighbour's, he will be clearly liable (*Bradbee v. Mayor, &c. of London*, 5 Scott, N. R. 120: *per Lord Denman, C. J. Dodd v. Holme*, 1 Ad. & E. 505. See *Peyton v. Mayor, &c. of London*, 9 B. & C. 725); though it has been decided that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall; nor, if he be ignorant of the existence of such adjoining wall, is he bound to use any extraordinary caution in pulling down his own. *Chadwick v. Trower*, 6 Bing. N. C. 1; reversing S. C. 3 Bing. N. C. 334; cited 5 Scott, N. R. 119. *Grocers' Company v. Donne*, Bing. N. C. 34. *Davis v. London and Blackwall Railway Co.* 2 Scott, N. R. 74.

The prevailing doctrine is, that a person building a house contiguous to and adjoining the house of another, may lawfully sink the foundation of his house below that of his neighbour's, and is not liable for any consequential damage, provided he used due care and diligence to prevent injury. *Panton v. Holland*, 17 Johns. 92. Am. R. It is said, "one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house, nor from building on his own land. But a distinction is made between an injury to a house built upon the land and an injury to the soil itself. It is held that the owner of land adjacent to the land of another has no right to remove the earth, and thus withdraw the natural support of his neighbour's soil, and if he does is liable for damages, and will be restrained by injunction. But this doctrine is strictly confined to those cases in which the owner of land has not, by building or otherwise, increased the lateral pressure upon the adjoining soil. *Farrand v. Marshall*, 19 Barb. 380. *Humphries v. Brogden*, 12 Q. B. 739. *Contrà, Smith v. Kenrick*, 7 C. B. 515. Thus, where one built a house on his own land within two feet of the boundary line, and ten years afterwards the owner of the land adjoining dug so deep into his own land as to endanger the house; and the owner of the house on that account left it and took it down:—*Held*, no action lay for the damage done to the house, but only for the damages arising from the falling of the natural soil into the pit so dug. *Thurston v. Hancock*, 12 Mass. 220.

It is a qualification of the general rule upon this subject, that while one who, in digging a foundation upon his own ground, so weakens the earth as to induce the fall of the wall of another, is not responsible for the loss, unless it was reasonably certain that such would be the effect of the act, and failed to apprise the other party, that he might use the proper preventives; yet case may be maintained against a person who, by digging away the earth on his own ground unskilfully, carelessly, and negli-

BUILDINGS, Right to Support for. *See* Easement.

BULL-Baiting. *See ante*, vol. i. p. 358. Driving bulls or animals through public thoroughfares, *see* Cattle.

BULLION. *See* Weights and Measures.

BURGAGE Tenement. See *Quo Warranto.*

BURGAGE Tenure. Tenure in burgage is thus described by Littleton, s. 162: "Where an ancient borough is, of which the king is lord, and they that have tenements within the borough hold of the king their tenements; and every tenant for his tenement ought to pay the king a certain rent by the year, &c. And such tenure is but tenure in socage. It is the same where any subject is lord of such borough, and the tenants hold of him to pay each of them an annual rent." Lit. s. 163. "The qualities of this tenure vary according to the particular customs of every borough, without prejudice to the feudal nature of it, and in conformity to the maxim, *Consuetudo loci est observanda.*" Id. ss. 165–7. *See* 2 Black. Com. 82, 83; Glanv. lib. 7, 3.

BURGESS.[1] *See* Borough, *ante*, vol. ii. p. 531; *post*, Municipal Corporation.

BURGESS List—BURGESS Roll. *Post*, Municipal Corporation.

BURGLARY.

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gently, either causes or accelerates the fall of an adjoining house. *Shrieve v. Stoke*, 8 Moore, 453. *Dodd v. Holme*, 3 Nev. & M. 739. *Trower v. Chadwick*, 3 Bing. N. C. 334. So, where it is alleged and proved that the defendant so negligently, unskilfully, and improperly dug his own soil that the plaintiff's house was thereby injured, an action lies; and although it be shown that the house was infirm, and could, at all events, only have stood a few months, still the plaintiff may recover in proportion to the loss actually suffered, if the jury find that the injury to the house was the consequence of the defendant's negligence; and in determining the question of negligence, the jury ought to consider the state of the plaintiff's house. *Dodd v. Holme.* 1 Ad. & E. 493. But mere juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall. So, in case by a reversioner of a house in Cheapside against the owner of the adjoining house, for pulling it down without shoring up the plaintiff's house, in consequence whereof it was impaired, and in part fell down:—*Held*, first, that upon this declaration the plaintiff could not recover on the ground of the defendant's not having given notice that he was about to pull down his house, that not being alleged as a cause of the injury; secondly, that, as the plaintiff had not alleged any right to have his house supported by the defendant, he was bound to protect himself by shoring, and could not complain that the defendant had neglected to do it. *Peyton v. The Mayor, &c.* 9 B. and C. 725.

[1] *Burgarii* and *burgenses* are properly men of trade, or the inhabitants of a borough or walled town. In Germany and other countries, burgess and citizen mean the same, but a distinction in 5 R. 2, c. 4, where the classes of the commonwealth are enumerated between *citizein de citee*, and *burgess de burgh*. *See* Co. Lit. 80. We now call those burgesses who serve in parliament for any borough.

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I. Statutory Enactments respecting: 24 & 25 Vict. c. 96, etc.

(A) *Burglary by Breaking Out.*

By 24 & 25 Vic. c. 96, s. 51, "whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary." Definition of burglary by breaking out.[1]

(B) *Punishment for Burglary.*

By 24 & 25 Vic. c. 96, s. 52, "whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Burglary, punishment for.

(C) *What Building within the Curtilage shall be deemed Part of the Dwelling-house.*

By 24 & 25 Vic. c. 96, s. 53, "no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other." What building within the curtilage shall be deemed part of the dwelling-house.[2]

(D) *Entering a Dwelling-house in the Night with Intent to commit a Felony, made Felony.*

By 24 & 25 Vic. c. 96, s. 54, "whosoever shall enter into any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of Entering a dwelling-house in the night

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[1] The above statute does not re-enact, but slightly varies from, 7 & 8 Geo. 4, c. 29, s. 11. The same facts which constitute a breaking in the ordinary case of burglary, such as lifting a latch or the like, will be deemed a breaking within the meaning of the section. *Rex v. Wheeldon*, 8 C. & P. 747. S. P. *R. v. Lawrence*, 4 id. 231.

[2] To be within the meaning of this clause, the building must be occupied in the same right. *R. v. Jenkins*, R. & R. 224. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. 24 & 25 Vic. c. 96, s. 55. *See post*, Housebreaking. *See* also *R. v. Barrowes*, M. C. C. 274. *Reg. v. Higgs*, 2 C. & Kir. 322.

with intent to commit a felony, made felony.

Punishment for.

felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

(E) *Being Armed or Disguised with Intent to Break into any House in the Night.*

Being armed or disguised at night with intent to break in.

By 24 & 25 Vic. c. 96, s. 58, "whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person), any picklock, key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

(F) *The like after a previous Conviction for Felony.*

The like after a previous conviction for perjury.

By 24 & 25 Vic. c. 96, s. 59, "whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall, on such subsequent conviction, be liable at the discretion of the court to be kept in penal servitude for any term not exceeding ten years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

(G) "*Night*," *meaning of.*

"Night," meaning of.[1]

By 24 & 25 Vic. c. 96, s. 1, "for the purposes of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

II. Burglary, what at Common Law.[2]

III. Must be in a Dwelling-house.

Rex v. Lyons, 1 Leach, C. L. 185; S. C. 2 East, P. C. 497. *Semble*, S. P. Hallard's case, cited 1 Russell on Crimes, 922.

The house must be a place of *actual residence*; therefore burglary cannot be committed in a house

One S. having purchased a house, with an intention to reside in it, had placed in it some of his furniture and effects to the value of 10*l.*; the house was put under the care of a carpenter for the purpose of being repaired, and S. had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatsoever, sleep therein. While the house was in this situation it was broken open in the night; and upon a case reserved, the judges

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[1] Time was deemed essential to the offence of burglary before the reign of Edw. 6, as in the fourth year of that king it is expressly laid down that it shall not be adjudged burglary, "*Nisi on le infriender del meason est per noctern.*" Bro. Corone, pl. 185. A breaking one night and an entry the next is sufficient (*Rex v. Jordan*, 7 C. & P. 432; Hale, 551), provided the breaking be with intent to enter and the entry with intent to commit a felony. *R. v. Smith*, R. & R. 417.

[2] Burglary at common law is the breaking or entering the dwelling-house of another in the night-time with intent to commit a felony therein. 4 Bl. Com. 224; 3 Ins. 63. The word is supposed to be derived from the Saxon word "*burcg*" or "*burh*," meaning a town or city, and the Norman French word "*laroun*," a robber. But this is very doubtful.

were of opinion that it could not be considered as a dwelling-house, being entirely uninhabited, and that, therefore, there could be no burglary.

under repair, which is not inhabited by the owner, although part of his property be there deposited.[1]

IV. Of the Occupancy which amounts to Ownership.

Farre's case, Kel. 43, 44.

A lady, whose house had been broken open, had for many years lived separate from her husband, and when she was about to take the house a lease of it was prepared in her husband's name, but he refused to execute; in consequence of which she agreed with the landlord herself, and had constantly paid the rent.

The owner may occupy by any person who is deemed part of his family.[2]

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[1] Lord Coke (3 Inst. 64), has said, "every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed." The term "dwelling-house" comprehends all buildings within the curtilage, or enclosure. *See* 1 Hale, P. C. 358, 559; 1 Hawk. P. C. c. 38, s. 12; East, P. C. 492. The house must, we have seen, be a place of actual residence; therefore burglary cannot be committed in a house under repair, which is not inhabited by the owner, although part of his property be there deposited. *Rex v. Lyons, supra* in text. Nor can it be committed in a newly-built house, even though the builder resides therein for its protection. *Rex v. Fuller*, 1 Leach, C. L. 186; S. C. 1 East, P. C. 498. And the same rule obtains where the prosecutor employs persons not in the capacity of servants to take care of his property, preparatory to his removal (*Rex v. Harris*, 2 Leach, C. L. 701; S. C. 2 East, P. C. 498); and though he has used it for his meals, and all the purposes of his business. *Rex v. Martin*, 1 R. & R. C. C. 108. So, where the owner of a house has no intention of residing therein, and merely sends a servant to sleep there, to protect his goods, &c., it cannot be deemed a dwelling-house (*Rex v. Davies and Another*, 2 Leach, 876; S. C. 2 East, P. C. 499); because either the owner, or his family or servants, must sleep therein (*Rex v. Thompson*, 2 Leach, C. L. 771; S. C. 2 East, P. C. 498); unless the absence be occasional or temporary, with an intention on the part of the owner of the house to return. *Nutbrown's case*, 2 East, P. C. 496; S. C. Fost. 76. Therefore, if A. have two dwelling-houses, and upon occasion he and all his family be sometimes at one and sometimes at the other, an entry into one of them in the night-time, in the absence of his family, will be burglary (1 Hale, P. C. 556); as where he is absent for a month, though no person be left therein. *Murray and Harris's case*, 2 East, P. C. 496. A permanent building, used and slept in only for a short time for the purpose of a fair, may be treated as the dwelling-house of the person so occupying it in an indictment for burglary, though unoccupied during the rest of the year. *Rex v. Smith*, 1 M. & Rob. 256. And it seems that if a person die in his house, and his executors put servants in it, a burglary may be committed therein. *Jones v. Longman's case*, cited 2 East, P. C. 499. The owner may occupy by any person who is deemed part of his family. *Farre's case*, Kel. 43, 44.

Every permanent building in which the renter or occupier and his family dwell is deemed a dwelling-house. Even a set of chambers in an inn of court or college is a dwelling-house for this purpose. 1 Hale, 556; 3 Ins. 65. *Monks v. Dykes*, 4 Mee. & W. 567. *Fenn v. Grafton*, 2 Bing. N. C. 617; 2 Scott, 56. And if any of the prosecutor's family or servants sleep there it will be sufficient. *R. v. Westwood*, R. & R. 495. *R. v. Gibbons*, id. 442. *R. v. Stock*, id. 185. But if a porter lie in a warehouse to protect goods, or a servant in a barn to watch thieves, this does not make the warehouse or barn a dwelling-house. *R. v. Smith*, 2 East, P. C. 496. *R. v. Brown*, id. 502. A dwelling-house may be divided so as to form two or more dwelling-houses (within the meaning of the definition of burglary), by letting part to a tenant, provided there be no internal communication between the part so let and the remainder. And a window looking into a passage in the other part is not an internal communication. *R. v. Eggington*, 2 B. & P. 508. If one of such divisions be not slept in by the occupier or his family, burglary cannot be committed therein (1 Hale, 558); but otherwise if it be. (Id.) *R. v. Rogers*, 1 Leach, 89, 428. And if the owner let off part, and do not by himself or family dwell in the other part, the part let off is the dwelling-house of the tenant. But if the owner let the shop, which is unconnected by internal communication with the dwelling-house, and also some of the rooms of the house to the same person, and the tenant or some of his family sleep in the rooms, a breaking and entering the shop will be a burglary, and it may be laid as committed in the dwelling-house of the landlord. *R. v. Gibson*, 1 Leach, 357; 2 East, P. C. 508; 2 Leach, 1015. *Fenn v. Grafton*, 2 Bing. N. C. 617. *R. v. Inhabitants of Macclesfield*, 2 B. & Adol. 870.

The building, however, must be a permanent one, and neither booths or tents are dwelling-houses. 1 Hale, P. C. 557; 1 Hawk. P. C. c. 38, s. 35; 4 Bl. Com. 226.

As to what shall be deemed to be within the curtilage, *see* 24 & 25 Vic. c. 96, s. 3, *ante*, p. 3.

[2] "If a general rule," observes Mr. East (2 East, P. C. 499, 500), "by which to ascertain

Upon an indictment for burglary, laying the dwelling-house in the husband, it was holden good.

V. There must be a Breaking.

(A) *Actual.*

Rex. v. Hughes and others, 1 Leach, C. L. 406; S. C. 2 East, P. C. 491.

There must be a *breaking*, and such as will afford an opportunity of *entering*, so as to commit the felony.[1]

On an indictment for burglary, it appeared that the prisoners had bored a hole with an instrument called a centre-bit, through the panel of a house-door, near to one of the bolts by which it was fastened, and that some pieces of the broken panel were found within the threshold of the door; but it not appearing that any part of the bodies of the prisoners had been within the house, or that the aperture was sufficiently large to admit a man's hand, the court held this not to be a sufficient entry, for the entry must be for the purpose of committing a felony; and the breaking must be such as will afford the burglar an opportunity of entering, so as to commit the intended felony.

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the ownership, might be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabit either by himself, his family, or servants, the indictment must lay the offence to have been committed against his mansion." *See* also 2 East, C. P. 501, 2; 2 And.

Where a married woman lived apart from her husband upon an income arising from property vested in trustees, for her separate use, it was decided that a house which she had hired to reside in was properly described as her husband's dwelling house, though she paid the rent out of her separate property, and the husband had never been in it. *Rex v. French*, 1 R. & R. C. C. 498. And see *Boggett v. Frier*, 11 East, 301. *R. v. Smith*, 5 C. & P. 202. And in *Rex v. Wilford*, 1 R. & R. C. C. 517, it was holden, that the house of a husband, in which he allowed his wife to live separate from him, might be described as the house of the husband, though the wife lived there in adultery with another man, who paid the housekeeping expenses, and though the husband suspected a criminal intercourse between his wife and the other man when he allowed her to live separate. But in *Rex v. Jobling*, 1 id. 525, where the owner of a cottage let one of his workmen, with his family, live in the cottage free of rent and taxes, and he lived there principally, if not wholly, for his own benefit, it was holden that it might be described as the workman's dwelling-house. Though in *Rex v. George Jarvis and Benjamin Walker*, 1 id. 7, it was decided, on an indictment for burglary, that if a servant lives in a house of his master's, at a yearly rent, the house cannot be described as the master's house, though it is on the premises where the master's business is carried on, and although the servant has it because of his service. So though a servant live rent-free for the purpose of his service, in a house provided for that purpose, yet, if he has the exclusive possession, and it is not parcel of any premises which his master occupies, it may be described as the house of the servant, especially if the house belongs not to his master, but to some person paramount to his master; as in the case of the toll-collector's house, occupied by the servant of the lessee of the tolls for the purpose of collecting the tolls. *Rex v. Morris*, 1 R. & M. C. C. 42; but *see* 1 R. & R. 185; also *R. v. Rawlins*, 7 C. & P. 150. And where apartments in the house of a corporation are appropriated as lodgings for their servants, it is the dwelling-house of the corporation. *R. v. Picket*, 2 East, P. C. 501. *R. v. Hawkins*, Fost. 38. A club-house is not the dwelling-house of the house-steward. *R. v. Ashley*, 1 C. & Kir. 198. Nor rooms in a royal palace of the occupant. *R. v. Williams*, 1 Hale, 522; Kel. 27; 1 Leach, 324; but see *R. v. Margette*, 2 Leach, 930. *R. v. Jones*, 1 id. 537. In order to be the dwelling-house of the occupier, he must have an interest in the premises, and not merely the use of them, as a guest at an inn. 1 Hale, 557. *R. v. Prosser*, 2 East, 502; 1 Hawk. c. 38, s. 26. If a house be let to several lodgers, and the owner do not reside on the premises, the burglary should be alleged to have been committed in the dwelling-house of the lodger whose room was broken and entered. *R. v. Rogers*, 1 Leach, 89. *R. v. Trapshaw*, 1 id. 427. *R. v. Baily*, 1 M. C. C. 23. *R. v. Carrol*, 1 Leach, 287. But if the owner reside on the premises, and there be no severance such as to make the part occupied by the lodger a separate dwelling-house, the burglary should be laid as having been committed in the dwelling-house of the owner. 1 Leach, 90, n.; Kel. 83, 84; 2 East, P. C. 503. *See* also *R. v. Gibbons*, R. & R. 442. *R. v. Sefton*, id. 202. *R. v. Wilson*, id. 115.

If there be even the least doubt as to how the house should be described, several counts alleging the owner to be A., B., or C. respectively should be adopted. If the owner of a house break into the rooms of a lodger and steal his goods, he cannot be convicted of burglary, but only of larceny (Kel. 84; 2 East, P. C. 502, 506), as no man can commit a burglary in his own house.

[1] It is a question for the jury whether the

(B) *Or Constructive.*

HAWKINS'S CASE, 1 East, 485.

A. was indicted for burglary. Upon the evidence it appeared that she was acquainted with the house, and knew that the family were in the country; and

An admission gained by fraud will con-

prisoner has been guilty of any act of breaking; but whether that act amounts to a burglarious breaking, is an unmixed question of law. *See* Fort. 107; 1 And. 114; Saville, 59; 1 Hale, P. C. 551; 3 Inst. 64. It is not every entrance into a house, in the nature of a mere trespass, which will be sufficient, or satisfy the language of an indictment—"*felonicè et burglariter fregit.*" 3 Inst. 64; 1 Hawk. P. C. c. 38, s. 4; 1 Hale, P. C. 551, 2. As, if a man enter into a house by a door or window which he finds open, or through a hole which was made there before, and steal goods or draw goods out of a house through such door, window, or hole, he will not be guilty of burglary; for, if a man leaves his doors or windows open, it is his own folly and negligence. 4 Black. Com. 226; 1 Hale, 551; 3 Inst. 64. *R. v. Lewis*, 2 C. & P. 628. *R. v. Spriggs*, 1 M. & R. 357. But a sufficient breaking is effected by making a hole in the wall, by forcing open the door, by pulling back, picking, or opening the lock with a false key, by breaking the window, by taking a pane of glass out of the window (1 Carr. 300); by drawing or bending the nails or other fastening, or by pulling back the leaf of a window with an instrument; and even the drawing or lifting up the latch where the door is not otherwise fastened, the turning the key where the door is locked on the inside, or the unloosing any other fastening which the owner has provided, will amount to a breaking. 1 Hale, P. C. 552; 3 Inst. 64; 1 Hawk. P. C. c. 38, s. 6; 2 East, P. C. 487. *R. v. Smith*, R. & R. 417; *R. v. Haines*, id. 451. *R. v. Hyams*, 7 C. & P. 441. So, if a thief enter by the chimney, it is a breaking, for it is as much closed as the nature of things will permit. 1 Hawk. P. C. c. 38, s. 4; 4 Black. Com. 226. Where an entry was effected by taking out the glass from a door, it was holden to be burglary. *Rex v. Smith*, R. & R. 417. And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was holden to be burglary, although there was an outer shutter which was not put to. *Rex v. Haines*, id. 451. So, where he raised a sash-window which was shut down close, but not fastened, though it had a sash which might have been fastened. *Rex v. Hyams*, 7 C. & P. 441. And where a window opening upon hinges and fastened with wedges, but so that by pushing against it it could be opened, it was holden to be burglary. *Rex v. Hall*, R. & R. 355. So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window, and opened it, it was holden to be a sufficient breaking. *Rex v. Robinson*, 1 Mood. C. C. 327. And where the party broke a pane of glass of a window, and put his hand in for the purpose of opening the shutter, though he did not succeed in doing so. *Rex v. Perkes*, 1 C. & P. 300. Where a glass window had been cut a month before, but every part of the glass remained in its place till the prisoner pushed it in, it was held to be a sufficient breaking. *Rex v. Bird*, 9 id. 44. In *Rex v. Callan* (R. & R. 157), the prisoner entered the premises by lifting up a heavy flap of a cellar, which was not bolted; and upon a question reserved, whether this was a sufficient breaking to constitute burglary, the judges were equally divided. In *Rex v. Laurence* (4 C. & P. 231), *Bolland, B.*, held it not a sufficient breaking; but in *Rex v. Russell* (1 Mood. C. C.), which was a later case, it was held that it did amount to a sufficient breaking. If a window is partly open, but not sufficiently to admit a person, the raising of it so as to admit a person is not a breaking of the house (*Rex v. Smith*, 1 id. 178); and where there was an aperture in a cellar window to admit light, through which the entry is made in the night, it is not sufficient. *Rex v. Lewis*, 2 C. & P. 628. The same where a similar hole was left in the roof. *Rex v. Spriggs*, 1 M. & R. 557.

The breaking must be of some part of the house; and therefore, where the defendant opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was holden not to be a breaking; there being a free passage from the area to the house in the hours of sleep. *Rex v. Davis*, R. & R. 322. So it was held, that the breaking of an outward gate, part of the outward fence of the curtilage of a dwelling-house, and which opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. *Rex v. Bennett*, id. 289. Where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling, lined with iron, it was held that the breaking and entering the shutter-box did not constitute burglary. *Rex v. Paine and Cooper*, 7 C. & P. 135. And the breaking is not restricted to a breaking of the outer wall, or doors, or windows of a house; if the thief get admission into the house by the outer door or window being open, and afterwards break or unlock an inner door, &c. for the purpose of entering one of the rooms of the house, it is burglary. 1 Hale, 553. *R. v. Johnson*, 2 East, P. C. 488. So if a servant, or a lodger, or a guest at an inn, open a chamber door not within his trust in the house in which he is, and enter for the purpose of committing a felony, it is burglary. 1 Hale,

stitute a burglarious breaking.[1]

meeting with the boy who kept the key, she prevailed upon him to go with her to the house, under the promise of a pot of ale: the boy accordingly accompanied her, opened the door and let her in, whereupon she sent the boy for the pot of ale, robbed the house, and went off. This was adjudged to be clearly felony in the woman, it being in the night-time.

VI. There must be an Entry.

GIBBON'S CASE, 2 East, P. C. 490; S. C. Fost. C. L. 107.

To constitute burglary, an entry with any part of the body, as a hand, is sufficient.[2]

This was an indictment against Gibbons for burglary in the dwelling-house of John Allan. It appeared that the prisoner in the night-time cut a hole in the window-shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole, took out watches and other things which hung within his reach; but no entry was proved otherwise than by putting his hand through the hole. And the judges held that to be burglary.

VII. There must be an Intent to commit a Felony.[3]

553, 554. But the breaking open cupboards and chests, &c. is not burglary. 1 Hale, P. C. 523, 524, 555; 1 East, P. C. 488.

[1] And where a servant conspired with others, and opened the door for a felonious purpose, this is burglary in both. *Cornwall's case*, 2 Stra. 881.

Or where thieves raised a hue and cry, and brought the constable, to whom the occupier of the house opened the door, and when they came in they bound the constable and robbed the owner, it was holden burglary. 1 East, P. C. 485; 1 Hawk. P. C. c. 38, s. 5, 3 Inst. 64. So if admission be gained under pretence of business (1 Hawk. P. C. c. 38, s. 8); or of taking lodgings (Keb. 63); or if one get possession of a dwelling-house by false affidavits, without any colour of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. Id. 43. So, if a man go to a house under the pretence of having a search-warrant, or of being authorised to make a distress, and by these means obtain admission, it is sufficient to constitute the offence. 1 Leach, C. L. 284. So, if by threats of violence the owner opens the door of his house, it is a sufficient breaking and entering. 1 East, P. C. 486; 1 Hale, P. C. 553; 1 Hawk. P. C. c. 38, s. 4. But a bare assault upon a house is insufficient; for where under such circumstances the owner threw his money out to the thieves, it was holden no burglary. 1 Hawk. P. C. c. 38, s. 3. And even where the assault was so violent as to break a hole in the house, yet there being no entry, but only a carrying away of the money coercively distributed, it was holden no burglary. 1 Hale, P. C. 555.

[2] Or a finger (1 R. & R. C. C. 499), or foot, or with any instrument introduced for the purpose of committing a felony. 1 Hale, P. C. 555; 3 Inst. 64; 1 Hawk. P. C. c. 38, s. 11; 1 And. 115; 4 Bl. Com. 227. As if a thief breaks a window of a house in the night-time, with an intent to steal, and puts in a hook (1 Hale, P. C. 555; 3 Inst. 64), or an infant (id.), to reach out the goods, or puts a pistol in at the window with intent to kill; this is a burglary, though the hand of the culprit be not within the window. (Id.) And where thieves came by night to rob a house, the owner went out and struck one of them, another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold, this was adjudged burglary. 2 East, P. C. 490. Though where a thief broke a hole in a house, intending to rob the owner, but had not otherwise entered when the owner from fear threw out his money to him, and he went off with it, it has been deemed not to amount to burglary. 1 Hale, P. C. 555. So, where thieves perforated a door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet as the instrument had not been introduced for the purpose of taking the property, or committing any other felony, it was decided that this entry was not sufficient to constitute burglary. *Rex v. Hughes*, 2 East, P. C. 491. *See* also *R. v. Rust*, 1 M. C. C. 183.

[3] To constitute burglary, there must be an intention to commit some felony; therefore, an intention to commit a mere trespass is not burglary. *Dobb's case*, 2 East, P. C. 511. For a breaking and entry, though both nocturnal and violent, will not be esteemed burglary, unless the party intended at the time to commit a felony (2 Leach, C. L. 717); even though it is possible that death might ensue, there being no original felonious intention. 3 Inst. 65; 1 Hale, P. C. 561. As where a servant, entrusted by his master to sell goods, receives the money, conceals it in the house, and after his dismissal breaks into the house and steals it, the entry is not burglarious, because there was no felony in the original taking. *Rex v. Dingley*, cited as *Baseley's case*, 2 Leach, C. L. 840; S. C. Show. 53. And where prisoners were proved to have

VIII. The Indictment.

(A) *What it must state.*[1]

(B) *Form of, for Burglary at Common Law.*[2]

(C) „ „ *by Breaking out.*[3]

BURIAL. *See* also Anatomy, vol. i. p. 347; *post*, Burial Board; Coroner; Dead Bodies; Death, Register of; Executors and Administrators; Registration of Births, Deaths, &c.

(A) *As to Persons entitled to Christian Burial, &c.* p. 10.

(B) *Of the Duty of Burying, on whom imposed*, p. 10.

(C) *Place of Interment*, p. 11.

(*a*) *In Churchyards*, p. 11.

(*b*) *In Churches*, p. 11.

(*c*) *Prohibition of Burials in Churchyards*, p. 11.

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broken open a house in the night-time to recover goods seized for want of a legal permit, for the use of the person from whom they were taken, an indictment for burglary with intent to steal was holden not to be supported. *Rex v. Knight*, 2 East, P. C. 510.

The best evidence of the intent is, that the defendant actually committed the felony alleged to have been intended (*R. v. Locost*, Kel. 30); or you may give in evidence any other facts from which the intent may be presumed by the jury. 1 Hale, P. C. 561.

[1] The words "*broke and entered burglariously and feloniously*," must be inserted (1 Hale, P. C. 550; 4 Co. 39, 40); and such breaking and entering must be charged to be *in the night*. 1 Hale, P. C. 549. The hour of the night should be stated. *Waddington's case*, 2 East, P. C. 513. The indictment must state the offence to have been committed in a *dwelling-house*. 1 Hale, P. C. 550. The *ownership* of the house should be stated, but it is not necessary to state the ownership of the goods. *R. v. Clarke*, 1 C. & Kir. 421. The intent to commit a felony should be stated, and if there be any doubt as to the intent, different counts should be inserted accordingly. The intent to steal, as well as the stealing, should be stated. 1 Hale, P. C. 550. But where the stealing was stated and the intent omitted, it was held that defendant could be convicted of burglary if the larceny was proved. *R. v. Furnival*, R. & R. 445. If the indictment be for breaking out of a house, it should conclude "against the form of the statute, &c."

[2] Surrey } The jurors for our Lady the
to wit. } Queen upon their oaths present that J. S., late of the parish of B., in the county of S., labourer, on the first day of June, in the twelfth year of the reign of our Soverign Lady Victoria, about the hour of eleven of the clock in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, the dwelling-house of one J. N., there situate, feloniously and burglariously did break and enter, with intent, the goods and chattels of one K. O., in the said dwelling-house then and there being, then and there feloniously and burglariously to steal, take, carry away, and then and there in the said dwelling-house [*here state the goods taken*] of the value of, &c., in the said dwelling, then and there being found, feloniously and burglariously did steal, take, and carry away, against the peace of our Lady the Queen, &c.

[3] Surrey } The jurors for our Lady the
to wit. } Queen upon their oaths present that J. S., late of the parish of B., in the county of S., labourer, on the first day of June, in the twelfth year of the reign of our Sovereign Lady Victoria, about the hour of eleven of the night of the same day, at the parish aforesaid, in the county aforesaid, being in the dwelling-house of J. N., there situate, one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of one J. O., in the said dwelling-house of the said J. N. then and there being, then and there in the said dwelling-house feloniously did steal, take, and carry away; and that the said J. S. being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid in manner and form aforesaid, he the said J. S. afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, then and there feloniously and burglariously did break out of the said dwelling-house of the said J. N., against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Escaping from a house by lifting a heavy flap-door which had no fastening, but which was kept down by its own weight, is not a sufficient breaking out of a house. *R. v. Lawrence*, 4 C. & P. 231.

(*d*) *New Grounds, how provided*, p. 12. *See* also Burial Board.

(D) *Mode of*, p. 13.

(*a*) *Burying in Woollen no longer Compulsory*, p. 13.

(*b*) *Of Burying in Iron Coffins*, p. 13.

(E) *Burial of Dead Bodies cast Ashore from the Sea*, p. 13.

(F) *Burial of Paupers*, p. 14.

(G) *Of the Duty of the Minister*, p. 14.

(H) *Fees for Burial*, p. 15.

(I) *Exemptions of Funerals from Tolls*, p. 15.

(J) *Tombstones, Vaults, &c.* p. 15.

(K) *Removal or Exhumation of Corpse*, p. 16.

(L) *Arrest of Corpse Illegal*, p. 16.

(M) *Obstructing a Burial*, p. 16.

(A) *As to Persons entitled to Christian Burial.*[1]

(B) *Of the Duty of Burying, upon whom imposed.*[2]

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[1] By canon 68, no minister shall refuse or delay to bury any corpse that is brought into the church or churchyard (convenient warnings having been given him thereof before), in such manner and form as is prescribed in the Book of Common Prayer, except the party deceased were denounced excommunicated, *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify to his repentance. But both before and since the Reformation, where evidence appeared to the bishop of such person's repentance, commissions have been granted, not only to bury persons who died excommunicated, but in some cases to absolve them in order to Christian burial. 3 Phil. 265; *sed vide* 53 Geo. 3, c. 127. It seems that attainted traitors and felons, who die before execution, are entitled to Christian burial; and as they are admitted to the receiving of the sacrament and other rites of the Church, and may be attended by ministers of the Church of England in their last extremity (*see* 1 Burn, Ecc. L. 261; Rogers, Burial).

Other excluded persons are the unbaptized and suicides. The rubric is, "Here it is to be noted that the office ensuing is not to be used for any that die unbaptized or excommunicate, or have laid violent hands upon themselves." In *Kemp v. Wicks*, 11 Dec. 1809, by *Sir John Nicholl*, the baptism of a child by a dissenting minister was held a sufficient baptism to entitle the child to Christian burial by a minister of the Church of England. With regard to suicides, it is provided by 4 Geo. 4, c. 52, that the coroner or other officer shall give directions for the private interment of the remains of a person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might, by the laws or customs of England, be interred, if the verdict of *felo de se* had not been found against such person, such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. But by sect. 2 it is enacted, that nothing therein shall authorise the performing any of the rites of Christian burial, or alter the laws or usages relating to the burial of such persons, except so far as it relates to the interment of such remains in such churchyard or burial-ground.

The proper judges whether persons who died by their own hands were out of their senses are, doubtless, the coroner's jury; or if the body cannot be viewed, the justices in sessions may inquire, though their finding is traversable. But the minister of the parish is neither entitled nor able to judge in the affair, but may well acquiesce in the public determination, without making any private inquiry. *Cooper v. Dodd*, 2 Robert. Ecc. R. 270.

[2] The common law casts upon the person under whose roof a death takes place the duty of providing sepulture for the body, and of carrying it to the grave decently covered; for such person cannot keep the body unburied, neither can he do anything to prevent Christian burial. He cannot cast out the body, or do violence to the feelings and health of the living; neither can he be permitted to carry it uncovered to the grave. This duty of providing burial for the dead extends, not only to private persons, but to public bodies also; and therefore, when the death takes place in an hospital for the cure of diseases, or other public establishment, the obligation of burying the body is imposed upon the governing body of the hos-

(C) *Of the Place of Interment.*

(*a*) *In Churchyards.*[1]

FRYER v. JOHNSON, 2 Wils. 28.

A custom to bury relations as near as possible to their ancestors is bad.

Action on the case against the parson of the parish, setting out that there had been a custom in the parish, time out of mind, that every parishioner had a right to bury his dead relations in the churchyard, as near to their ancestors as possible; and that the defendant refused to permit the plaintiff to bury a relation as near as possible to his ancestor. After a verdict, this was holden to be a bad custom.

(*b*) *In Churches.*[2]

(*c*) *Prohibition of Burials in Churchyards, &c.*[3]

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pital or establishment. *R. v. Stewart*, 12 Ad. & E. 773. If a parent has the means of providing Christian burial for the body of his child, he is bound to do so; but he is not liable to be indicted for a nuisance if he has not the means of burying it; and this even though he could obtain a loan of money to enable him to provide for the burial; for, according to *R. v. Vann* (21 L. J. R. N. S. M. C. 39), a person is not bound to accept a loan and render himself liable to be proceeded against and lose his liberty, and be deprived of the means of maintaining his family, by incurring a debt. See *Chappel v. Cooper*, 13 Mee. & W. 252. *Ambrose v. Kerrison*, 10 C. B. 776. *Jenkins v. Tucker*, 1 H. B. 394.

[1] Every person is entitled to be buried in the churchyard of the parish where he dies, without paying anything for the breaking of the soil. Degge. p. 1, c. 12. *Gilbert v. Buzzard*, 2 Cons. Rep. 343; 3 Phil. Rep. 348. *Littlewood v. Williams*, 1 Marsh. 589; 6 Taunt. 277. Though ordinarily it seems a person cannot be buried in the churchyard of another parish than that wherein he died; at least, without the consent of the parishioners or churchwardens; and perhaps also the acquiescence of the incumbent, whose soil is broken. Thus, in the case of the churchwardens of Harrow (cited 1 Burn, Ecc. L. 258), it is said, that upon a process against them for suffering strangers to be buried in their churchyard, and there appearing and confessing the charge, they were admonished by the ecclesiastical judge not to suffer the same for the future. But where a parishioner dies on his journey, or otherwise out of the parish, it is said the rule might be different, as it seems to be where there is a family vault or burying-place in the church, or chancel, or aisle. *Borden v. Calcott*, 1 Hagg. 17.

[2] No person can be buried in the church, or in any part of it, without the consent of the incumbent; and this privilege is confined to the parson only, exclusive of the bishop and churchwardens. Cro. Jac. 367; Gibs. 453; Wats. c. 39, p. 887.

[3] There is no technical requirement as to the manner in which a dead body shall be interred. *See* elaborate judgment of *Lord Stowell* in *Gilbert v. Buzzard*, 2 Cons. 343; 3 Phil. 348. At common law, there are no means to compel a rector to bury a corpse in a vault or particular part of a churchyard, *Ex-parte Blackmore*, 1 B. & Adol. 122.

Closing Churchyards, &c.—The great inconvenience arising from the interment of the dead in the existing churchyards of the metropolis and other populous places has been remedied by 15 & 16 Vic. c. 85 (repealing a former act, 13 & 14 Vic. c. 85), the provisions of which are confined to the metropolis, but are extended to other places by 16 & 17 Vic. c. 134; and are further amended by the 18 and 19 Vic. c. 128; 20 & 21 Vic. c. 35, ss. 20 & 21; id. c. 81.

Order in Council to be made.—On the representation of a secretary of state that, for the protection of public health, burials in any part or parts of the metropolis, or in any burial-grounds or places of burial in the metropolis, should be wholly discontinued, or discontinued subject to any exception or qualification the Queen in council may order, that after a time mentioned in the order burials in such parts, &c. of the metropolis, or in such burial-grounds, &c., shall be discontinued, either wholly or subject to exceptions or qualifications to be specified. Notice of the representation, and of the time when it shall be taken into consideration, is to be fixed on the churches and chapels to be affected. Ten days' notice of a representation to be made in relation to the burial-ground of a parish to be given to the incumbent and vestry clerk (15 & 16 Vic. c. 85, s. 2).

The 16 & 17 Vic. c. 134, s. 1, gives a power to the Queen to order that no new burial-grounds shall be opened in any city or town, or within any other limits, without the previous approval of a secretary of state; or that, after a time mentioned in the order, burials in any city or town, or within any other limits, or in any burial-grounds or places of burial, shall be discontinued, wholly or subject to exceptions or qualifications.

The 18 & 19 Vic. c. 128, s. 1, enables the Queen in council to postpone the time appointed by any order for the discontinuance of burials, or otherwise to vary any order made under these acts, whether the time thereby appointed for the discontinuance of burials has or has not arrived.

Burials Prohibited after Order—Penalty.—It shall not be lawful after the time mentioned in any order for the discontinuance of burials, to bury the dead in any church,

(*d*) *New Grounds, how provided.*[1]

chapel, churchyard, or burial-place, or elsewhere within the parts to which the order extends, or in the burial-grounds or places of burial (as the case may be) in which burials have by such order been ordered to be discontinued, except as in the act is excepted; and any person after such time burying, or assisting in the burial, of any body contrary to this enactment, is made guilty of a misdemeanor (15 & 16 Vic. c. 85, s. 4, and 16 & 17 Vic. c. 134, s. 3). A penalty, not exceeding 10*l.*, recoverable summarily before two justices of the peace, is imposed upon any person knowingly and wilfully burying, or assisting in such burial, by the 18 & 19 Vic. c. 128, s. 2.

After the time from which burials, in any place of burial in a metropolitan parish, are required to be discontinued, the body of any parishioner or inhabitant of such parish shall not be buried in any burial-ground within the metropolis belonging to any other metropolitan parish, save where the body of any of the family or relatives of such person has been there interred, and the relatives or persons having the care and direction of the funeral signify a desire that on that account the body of such person should be there interred, such burial-ground not being one in which burials have been ordered to be discontinued. The keeper of such burial-ground, knowing, authorising, or permitting such burial there, is guilty of a misdemeanor (15 & 16 Vic. c. 85, s. 52).

Definition of Parish.—"Parish" means every place having separate overseers of the poor, and maintaining its own poor (15 & 16 Vic. c. 85, s. 52).

Not to extend to Quakers or Jews, or Private Burial-grounds.—No such order in council is to extend to any burial-ground of Quakers or Jews used solely for the burial of such people or persons, unless the same be expressly mentioned in the order; and nothing in the act is to prevent the burial in any such burial-ground in which interment is not required to be discontinued of the bodies of such people or persons. And no such order in council is to extend to any non-parochial burial-ground being the property of a private person, unless it be expressly mentioned in the order (15 & 16 Vic. c. 85, s. 3; 16 & 17 Vic. c. 134, s. 2).

Burying in Vaults preserved.—Where under any faculty legally granted, or by usage or otherwise, there is at the time of the passing of the act any right of interment in or under any church or chapel affected by an order, or in a vault of such church or chapel, or of any churchyard or burial-ground affected by such order, and where any exclusive right of interment has been purchased or acquired before the passing of the act, a secretary of state may, on application being made to him, and being satisfied that the exercise of such right will not be injurious to health, grant a license for its exercise during such time, and subject to such conditions and restrictions, as he thinks fit; but such license is not to prejudice or affect the authority of the ordinary, or of any other person who, if the act had not been passed, might have prohibited or controlled under such right; nor dispense with any consent which might have been required; nor otherwise give to any such right any greater force or effect than it would have had if the act had not been passed (15 & 16 Vic. c. 85, s. 6; 16 & 17 Vic. c. 134, s. 4).

Exception of Cemeteries.—The provisions of the 15 & 16 Vic. c. 85, are not to extend to authorise the discontinuance of burials or to prevent burials in any of the cemeteries mentioned in the schedule to the act (which are all established under local acts in the neighbourhood of the metropolis), or in any burial-ground or cemetery to be thereafter provided, with the approval of a secretary of state. (Sect. 7.)

[1] The acts for the erection of additional churches provide that all such parishes, or extra-parochial places, *as shall be required* by the church commissioners, shall furnish lands for enlarging, erecting, or making additional churchyards or burial-grounds, as the commissioners shall deem necessary; and the commissioners shall give notice to the churchwardens, to be left at their abodes, of the intention to enlarge the existing or set out new burial-grounds; and of the extent of ground required for such purpose, and for a proper approach thereto, and of the place in which the same is required to be provided; and the churchwardens shall within fourteen days call a meeting of the vestry, or persons possessing the powers of vestry, for taking all necessary measures for providing the same; and in case the parish or place cannot provide the same without purchase, the vestry, or persons possessing the powers of vestry, are required forthwith to proceed to treat for ground according to such notice, but shall not conclude any bargain without the commissioners' approbation (59 Geo. 3, c. 134, s. 36). By 58 Geo. 3, c. 45, s. 33, the commissioners may accept from persons willing to give any buildings fit to be converted into churches or chapels, and any lands or tenements for sites, not exceeding in quantity what may be sufficient for building a church or chapel and providing a churchyard, as well as a house and garden, with five (1 & 2 Vic. c. 107, s. 9) acres of land for a residence.

In support of the application, the 15 & 16 Vic. c. 85, s. 10, provides, "that on the written requisition of ten or more ratepayers, the churchwardens, or other persons to whom it belongs to convene meetings of the vestry of such parish, shall convene a meeting of the vestry for the special purpose of determining whether a burial-ground shall be provided under the act for the parish." By the interpretation clause (s. 51), the word "vestry" is to mean the inhabitants of the parish lawfully assembled in vestry, or for any of the purposes for which

(D) *Of the Mode of Burial.*

(*a*) *Burying in Woollen no longer compulsory.*

Formerly, for the encouragement of the woollen manufacture, a compulsory use of woollen shrouds for the dead was thought expedient (30 Car. 2, c. 3, and 32 Car. 2, c. 1); but, by the 54 Geo. 3, c. 108, these acts are repealed.

(*b*) *Of Burying in Iron Coffins.*

Rex v. Coleridge, 2 B. & A. 806; S. C. 1 Chit. Rep. 588.

The mode of burial being a matter purely for the ecclesiastical court, the court of K. B. refused to grant a *mandamus* for the burial of a body in a parish churchyard in an unusual way; for instance, in an iron coffin.[1]

A rule *nisi* had been obtained for a *mandamus* to the rector, officiating curate, churchwardens, and sexton, of the parish of B., to compel them to inter the body of a parishioner in an iron coffin, which, it appeared, was a new and unusual mode, the general custom being to bury in wooden coffins. It was urged in this cause that it was clear, from a statement of the numbers annually buried, that the churchyard would, were such new mode recognised, in a short time be filled, which, the court said, was a cogent reason why they should discharge the rule, even if there did not exist an insuperable objection to the tenability of the application; viz. that such a question was a matter of purely ecclesiastical cognisance; and, they observed, it was well known that in such cases the temporal courts would not interfere; and upon the latter point they made the following remarks:—"It may be admitted, that the right of sepulture is a common-law right, but the mode of burial is a subject of ecclesiastical cognizance alone. If a clergyman should absolutely refuse to bury the body of a dead person brought for interment, in the usual way, we are by no means prepared to say that this court would not grant a *mandamus* to compel him to inter the body; but in so doing we should be acting in aid of the Ecclesiastical Court. Here, however, there has been no absolute refusal to bury, but only to bury in a particular mode. Let the rule be therefore discharged with costs."

See Willes, 536; 5 T. R. 364; 1 Burn's Eccl. Law, tit. Burial, edited by Mr. Tyrwhitt; 1 Salk. 334; Palm. 51; 8 Mod. 28; 2 T. R. 484; 6 Taunt. 281.

(E) *Burial of Dead Bodies cast Ashore from the Sea.*[2]

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vestries are holden, except in those parishes in which there is a select or other vestry elected under the 59 Geo. 3, c. 12, or 2 Wm. 4, c. 60, or elected under the provisions of any local act of parliament for the government of any parish by vestries, in which parishes it shall mean such select or other vestry. By the 16 & 17 Vic. c. 134, s. 7, the provisions of those sections are extended to those parishes not in the metropolis. See *Re Sunderland Vestry*, 25 L. J. Q. B. 271; *Re Liverpool Burial Board*, 26 id. 213.

The 20 Vic. c. 19, relating to extra-parochial places, enacts, "that after the 31st December, 1857, every place entered separately in the report of the Registrar-General on the last census which is reported to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall, for all the purposes of assessment to the poor-rate and the burial of the dead, be deemed a parish for such purposes."

[1] Lord Stowell afterwards directed that such coffins should be received in the parish, receiving an increased rate for the longer occupation of the ground. 2 Hagg. 333.

[2] *Bodies cast on Shore.*—The 48 Geo. 3, c. 75, enacts, "that the churchwardens and overseers in any parish in which any dead human body is cast on shore from the sea shall, upon notice thereof given to them, cause such body to be conveyed to some convenient place, and with all speed cause it to be interred, with the customary duties, in the parish churchyard or burial-ground, so that the expenses thereof and fees, &c. do not exceed the sum allowed by such parish for the burial of persons buried at the expense of the parish; but if such body is cast on shore in any extra-parochial place, where there are no churchwardens, &c., such notice shall be given to the constable or headborough thereof, who shall proceed as before directed in case of churchwardens," &c.

Reward for Notice.—By s. 3, "every person finding any such body on the shore, and giving notice within six hours after to such officers, &c., or shall leave such notice at their usual abode, shall be entitled to five shillings for his trouble, but no greater sum shall be given for one notice, though there may be more bodies than one; but the expenses are to be borne by the county." And the act directs that one justice for the county or place in which such bodies are buried shall, by writing under his hand,

(F) *Burial of Paupers.*[1]

(G) *Of the Duty of the Minister.*[2]

direct the treasurer of the county to pay to such churchwardens, constable, &c., such sum for his expenses about the execution of this act as he may deem reasonable, after the same have been verified on oath.

Penalty for Neglect.— Persons finding bodies, and neglecting to give notice within six hours after, shall forfeit 5*l.*; and every churchwarden, &c. neglecting to remove such bodies from the shore for twelve hours after such notice, or to perform the other duties hereby required of them, shall forfeit for each offence 5*l.* (Ss. 4, 7.)

Penalties, how recovered.— All penalties, if not paid on conviction, shall be levied with costs, and paid to the informer, by distress and sale of the offender's goods, by warrant under the hand and seal of any justice for the county or place; which he may grant on confession, or on evidence of one witness on oath. And in default of a distress the offender may be committed to the county gaol, or house of correction, for not exceeding two calendar months, nor less than fourteen days, unless the penalty and charges be sooner paid.

Appeal.—The party may appeal to the quarter sessions next after one month after the cause of such appeal arose, on giving ten days' notice of the matter thereof, and entering into recognisance before some justice of the county or place, with sufficient sureties, to abide the order and award of the court thereon, who may order costs to either party, mitigate the penalty, or direct further reasonable satisfaction to be made to the party injured, and such their determination shall be binding and conclusive.

Manors still liable.—Lords of manors throughout England shall pay to the churchwardens, constables, &c. of such parishes or places, such sums as they were accustomed to pay for placing any such bodies into the ground in the state in which they were found; such sums to go in part discharge of the expenses incurred under this act, and credit to be given for the same by such churchwardens, &c. in their accounts with the county. (S. 13.)

An order purporting to be the order of a magistrate on the treasurer of a county, to reimburse the expenses of burying a dead body cast on shore, was held (on a case reserved) to be a forgery, though there was no such magistrate, and though the order did not state the person to whom the money was directed to be paid to be a parish officer, or that the expenses incurred were reasonable and necessary. *Rex v. Froud*, tried Launceston spring assizes, 1819, and argued in the Exchequer Chamber, June 26, 1819, 1 Bro. & Bing. 300.

[1] The 7 & 8 Vic. c. 101, s. 31, enables the local authorities to charge the expenses of burying paupers on the poor-rates: it enacts, "that it shall be lawful for guardians, or where there are no guardians, for the overseers, to bury the body of any poor person which may be within their parish or union respectively, and to charge the expense thereof to any parish under their control to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be; and unless the guardians, in compliance with the desire expressed by such person in his lifetime, or by any of his relations, or for any other cause, direct the body of such poor person to be buried in the churchyard or burial-ground of the parish to which such person has been chargeable (which they are hereby authorised to do), every dead body which the guardians or any of their officers duly authorised shall direct to be buried at the expense of the poor-rates shall (unless the deceased person, or the husband or wife, or next of kin of such deceased person have otherwise desired) be buried in the churchyard or other consecrated burial-ground, in or belonging to the parish division or parish chapelry or place in which the death may have occurred; and in all cases of burial under the direction of the guardians or overseers as aforesaid, the fee or fees payable by the custom of the place in which the burial may take place, or under the provisions of any act of parliament, shall be paid out of the poor-rates for the burial of each such body to the person or persons who by such custom or under such act may be entitled to receive any fee."

[2] The duty cast upon the clergyman by his office, in respect of burials, is enforced by canon 68, which provides that no minister shall refuse or delay to bury any corpse that is brought to the church or churchyard convenient, warning being given him thereof in such manner and form as is prescribed in the Book of Common Prayer; and if he shall refuse so to do, except the deceased were denounced excommunicated, *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry by the space of three months. But where sufficient evidence has appeared to the bishop of the repentance of the deceased, commissions have been granted, both before and since the Reformation, not only to bury persons who died excommunicated, but to absolve them in order to Christian burial. Gibs. 450.

It is in the minister's discretion whether a corpse shall be carried into the church or not. 1 Burn's Ec. L. 267. The 67th canon directs, that after the party's death there shall be rung no tune but one short peal—one before the burial and another after the burial.

An information lies for refusing to bury a parishioner (*Rex v. Taylor*, cited 1 Burn's Ec. L. 298; Willes, 538 n.), but not for refusing to read the burial service where the deceased had not been baptized. (Id.)

(H) *Fees for Burial.*[1]

(I) *Exemptions of Funerals from Tolls.*[2]

(J) *Tombstones, Vaults, &c.*[3]

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[1] The accustomed fee to the minister for breaking the soil of the churchyard is generally 3*s.* 4*d.*; and for breaking the floor in the chancel, 6*s.* 8*d.* Degge's *Parson's Law*, 146. Any fees greatly in excess of these are open to objection. *See* Gibson, 452. *Gilbert v. Buzzard*, 2 Cons. 343; 3 Phil. R. 348. The authorities all concur in declaring that the payment of fees is not a condition precedent to the right of interment, nor payable of common right.

The fees in some parishes are regulated by statute, and in others by custom. *Andrews v. Cawthorne*, Willes, 536; S. P. *The Bishop of St. David's v. Lucy*, 1 Lord Raym. 447; S. C. 12 Mod. 227. Hence a custom that the churchwardens of a parish are to have the burial-fees (*Anon.* 1 Vent. 274), or that the churchwardens are to take the money for burying in the church or churchyard, and the parson for burials in the chancel, is good. *Anon.* 2 Show. 184. And where a license is necessary, the person giving it may demand his own fees; and if an alleged custom to charge a certain fee be denied, it is triable at law. *Dean and Chapter of Exeter's case*, 1 Salk. 334; S. P. *Anderson v. Walker*, 3 id. 86. And where an agreement had subsisted between the churchwardens and the vicar of a parish, that on the interment of a stranger in the churchyard they should divide the fees, and the sexton was deputed by them to receive and pay over such fees to each party; a subsequent vicar refused to assent to the above compact, and obtained the whole of the fees from the sexton, who continued to receive them:—It was holden that the churchwardens might recover a moiety from the vicar, as money had and received. *Littlewood v. Williams*, 1 Marsh. 589; S. C. 6 Taunt. 277. But where the defendant received money for burial-fees in his capacity as churchwarden, and paid it over to the trustees appointed for that purpose, previous to the commencement of the action, he was holden not liable for money had and received. *Horsfall v. Handley*, 2 B. Moore, 5; S. C. 8 Taunt. 136.

Fees for Corpse passing through Parish.— In the case of *Topsall v. Ferrers* (Hob. 175), an alleged custom in the parish of St. Botolph's, London, was set up, to the effect that if any person die within that parish and be carried out of the parish to be buried elsewhere, in such case there ought to be paid to the parson of this parish, if he or she be buried elsewhere in the chancel, so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them for such as were buried in their own chancel; but it was held to be contrary to reason, that one who is no parishioner, but may pass through the parish, or lie in an inn for that night, should, if he then die, be forced to be buried there, or to pay as if he were, and thus have to pay twice for his burial. *See* also Salk. 332.

[2] Sect. 14, 20 & 21 Vic. c. 81, recites s. 32, 3 Geo. 4, c. 126, by which it is enacted "that no toll shall be demanded or taken by virtue of that or any other act or acts of parliament on any turnpike-road of or from any inhabitant of any parish, township, or place in which any turnpike-road shall lie, from and after the first day of July, one thousand eight hundred and fifty-eight, or from and after the termination of any now existing lease of tolls expiring before that date, the said enactment shall extend to exempt from toll every person going to or returning from attending the funeral of any person who shall be buried in any burial-ground provided for the parish, township, or place in which he died, under the acts hereinbefore recited, and this act, or any of them, or under any other act of parliament, although such burial-ground be not within the limits of the parish, township, or place, for which it may have been provided, or in which the turnpike-road shall lie."

[3] *Tombs, Vaults, &c.*— The rector has the freehold of the church for public purposes to supply places for burial from time to time, as the necessities of his parish require; and not to grant away vaults, unless a faculty be obtained from the ordinary. *Bryan v. Whistler*, 8 B. & C. 288. And a party who erects a tomb in a churchyard, without due authority, may be proceeded against in the Ecclesiastical Court. *Bardin v. Calcott*, 1 Hagg. R. 14. And where a faculty is sought to be obtained for erecting a vault in a churchyard, the court will scruple to decree it without being satisfied that the proposed erection is not likely to be generally prejudicial to the parish —even though the issuing of the faculty be unopposed, either on the part of the parish or of any particular parishioner. *Rosher v. Vicar of Northfleet*, 3 Add. R. 14. And, therefore, if the rector permit the erection of a vault, and agree that the party shall have the exclusive use thereof for a pecuniary consideration, and he afterwards cause it to be opened for the interment of other persons, no remedy lies against him, as he had no power to make such a grant. *Bryan v. Whistler, supra.* See *Spooner v. Brewster*, 2 Car. & P. 34.

Fees on Erecting.— Custom often annexes fees for erecting a stone, &c. by which the grave may be protected, and the memory of the person interred preserved. It is not a common-law right; but where a custom is shown, such practice will be supported. See *Bardin v. Calcott*, 1 Hagg. Rep. 14. And whether this fee belongs to the incumbent seems to rest upon ancient usage; though it is observed, that after the soil has been broken for interring the dead, the grass will will grow again, and continue beneficial to

(K) *Removal or Exhumation of Corpse.*[1]

(L) *Arrest of Corpse Illegal.*[2]

(M) *Obstructing a Burial.*[3]

BURIAL-Board.[4] *See* also *ante*, Burial; *post*, Cemetery; Church; Churchyard; Churchwardens; Health, Board of; Overseers; Parish.

(A) *Preliminary Meeting of Vestry*, p. 17.

(B) *Appointment of Board*, p. 17.

(C) *Expense, how Defrayed*, p. 17.

(D) *Provisions of* 16 *&* 17 *Vic. extended beyond Metropolis*, p. 18.

(E) *Meeting of Vestry may be held upon Requisition of Ratepayers*, p. 18.

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(H) *Resolution, &c. of Vestry not Void by Irregularity in Notices, &c.* p. 18.

(I) *Duties and Powers of Board*, p. 19.

(J) *Authority of Secretary of State*, p. 19.

(K) *Construction of Acts*, p. 19.

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the incumbent, but after the erection of a monument, there ceases to be any further produce of the soil in that place. And if the incumbent's leave is necessary for the erecting a monument, it seems that he may prescribe his own reasonable terms, unless an accustomed fee has been paid. 1 Burn's Ecc. L. 273.

Ownership of Tombstones, &c.—The possession and right of property in tombstones erected in a churchyard belong not to the parson but to those who erected them; and if any one deface or injure them, such owners may have their action of trespass against the wrongdoer. *Bryan v. Whistler, supra.*

[1] After burial the body cannot be again taken up for the purpose of being removed elsewhere, and again buried, without first having obtained a faculty from the ordinary. Gibson, 454. And it is a misdemeanor at common law to enter an unconsecrated burial-ground, and without the knowledge or consent of the owners of it, or authority of any kind, to dig up or carry away a corpse buried in such ground, even although the person committing the act may have been actuated by motives of affection and respect to the deceased, and of religious duty, and have conducted the removal decently. *R. v. Sharpe*, 26 L. T. M. C. 47. It is also an indictable offence to take up dead bodies out of a churchyard for the purposes of dissection. *Rex v. Gilles*, Russ. & Ry. 366; 20 & 21 Vic. c. 81, c. 25. The removal of a dead body after burial to another place of sepulture may now take place under a secretary of state's license. The coroner may order the disinterment. Jer. Cor. 28.

[2] The notion that a dead body may be arrested for debt has now become obsolete, though it at one time prevailed. Wood, Cro. L. 143; Lind. 278. The authority of the case cited by *Hyde, C. J.*, in *Quick v. Coppleton*, (1 Lev. 161; 1 Sid. 242; 1 Keb. 866), in which a woman was holden liable on a promise to pay in consideration of forbearance to arrest the dead body of her son; was thus eloquently contradicted by *Lord Ellenborough* in *Jones v. Ashburnham*, 4 East, 460–465:—"It is impossible to contend that this last forbearance could be a good consideration, for an *assumpsit* to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion on the relatives. It is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal, and therefore any promise extorted by the fear of it could never be valid in law. It might as well be said that a promise in consideration that one would withdraw a pistol from another's breast could be enforced against the party acting under such unlawful terror."

Where a gaoler refused to deliver up the body of a prisoner who had died in his custody, unless certain claims against the deceased were satisfied, the court compelled him to do so by *mandamus*. *Reg. v. Fox*, 2 Q. B. 247.

[3] An indictment for obstructing the burial of a person, stating that the defendant "unlawfully, &c., by threats and menaces, prevented and hindered the burial," is too general. *Rex v. Cheere*, 4 B. & C. 902; 6 D. & R. 461.

[4] The Court of Sewers of the city of London, by sect. 43 of 15 & 16 Vic. c. 85, is to be the burial-board for the parishes and liberties therein. It has provided a spacious cemetery at Ilford, Essex.

(A) *Preliminary Meeting of Vestry.*[1]

(B) *Appointment of Board.*[2]

(C) *Expense, how Defrayed.*[3]

[1] By 15 & 16 Vic. c. 10, "upon requisition in writing of ten or more ratepayers of any parish in the metropolis in which the place or places of burial shall appear to such ratepayers insufficient or dangerous to health (and whether any order in council in relation to any burial-ground has or has not been made), the churchwardens or other persons to whom it belongs to convene meetings of the vestry of such parish shall convene a meeting of the vestry for the special purpose of determining whether a burial-ground shall be provided under this act for the parish; and public notice of such vestry meeting, and the place and hour of holding the same, and the special purpose thereof, shall be given in the usual manner in which notices of the meetings of the vestry are given, at least seven days before holding such vestry meeting; and if it be resolved by the vestry that a burial-ground shall be provided under this act for the parish, a copy of such resolution, extracted from the minutes of the vestry, and signed by the chairman, shall be sent to one of her Majesty's secretaries of state."

By sect. 52, "under the 22d sect. of this act, the word 'parish' shall mean every place having separate overseers of the poor, and separately maintaining its own poor. Three parishes, not having separate overseers, and not separately maintaining their own poor, concurred with a hamlet in providing a common burial-ground. On application for a *mandamus* to the burial-board for those parishes to receive the purchase-money of the burial-ground:—*Held*, that sect. 52 did not exclude those parishes. *Reg. v. St. Peter, St. Gregory All Souls, and Bullingdon-cum-Brandon*, in the borough of Sudbury, 4 Jur. N. S. 948; 27 L. J. Q. B. 232.

In a parish under a local act a body called the select vestry of the parish have the functions of a board of guardians. There is also a general vestry, having the management of the general parochial affairs of the parish:—*Held*, that the members of a burial-board for the parish, under the 16 & 17 Vic. c. 134, s. 7, 15 & 16 Vic. c. 85, ss. 10, 11, 52, were to be elected by the general vestry having the management of the general parochial affairs, and not by the body created by the local act. *Reg. v. Gladstone*, 7 El. & Bl. 375; 3 Jur. N. S. 441; 26 L. J. Q. B. 213. The body electing must be the real governing body of the parish. *In re Sunderland*, 25 L. J. Q. B. 271. *R. v. Peters*, 6 E. & B. 225.

The act authorising the formation of a burial-board in a "parish" is applicable to a parish not having separate overseers, nor separately maintaining its poor. By sect. 52, "the interpretation clause extends the meaning of the word to places not parishes, having separate overseers, and separately maintaining its own poor, but does not exclude parishes which, for any reason, do not fulfil those conditions." *Reg. v. Sudbury Burial-Board*, 27 L. J. Q. B. 232; 4 Jur. 948. The powers of 15 & 16 Geo. 3, are excluded by 18 & 19 Vic. c. 128, under latter statute.

Where a part of a parish may, under sect. 12, appoint a burial-board for such part severed from the rest of the parish, may, by implication under the same section, appoint a burial-board of its own. *Viner, app. The Churchwardens and Overseers of Tunbridge resps.* 5 Jur. N. S. Q. B. 1293.

Under a local act for the administration of the poor-laws in the parish of L., a select vestry was to be elected to carry out the provisions of the act, and to be the board of guardians of the poor, with the duties and privileges of such guardians in general. A select vestry had accordingly been elected, and performed the duties imposed by the act, the vestry of the parish at large retaining all its functions in the general management of the parish:—*Held*, that the select vestry was not a vestry elected under a local act for the government of the parish, within sect. 52 of the 15 & 16 Vic. c. 85, and that the right to appoint a burial-board under the 10th and 11th sections was in the general vestry. *Re Burial-Board of Liverpool*, 26 L. J. Q. B. 213.

[2] By sect. 11, "in case of such resolution as aforesaid, the vestry shall appoint not less than three, nor more than nine persons, being ratepayers of the parish, to be the burial-board of such parish, of whom one-third, or as nearly as may be one-third (to be determined among themselves), shall go out of office yearly at such time as shall be from time to time fixed by the vestry, but shall be eligible for immediate reappointment: Provided always, that the incumbent of the parish shall be eligible to be appointed and reappointed from time to time as one of the members of the said board, although not a ratepayer of the parish; provided also, that any member of the board may at any time resign his office, on giving notice in writing to the churchwardens or persons to whom it belongs to convene meetings of the vestry."

[3] By sect. 19, "the expenses incurred or to be incurred by the burial-board of any parish in carrying this act into execution, shall be chargeable upon and paid out of the rates for the relief of the poor of such parish, the expenses to be so incurred for or on account of any parish in providing and laying out a burial-ground under this act, and building the necessary chapel or chapels, those not to exceed such sum as the vestry shall authorise to be expended for such purpose; and the overseers or other officers authorised to make and levy rates for the relief of the poor in any parish

(D) *Provisions of 16 & 17 Vic. extended beyond Metropolis.*[1]

(E) *Meeting of Vestry may be held upon Requisition of Ratepayers.*[2]

(F) *Mode of enforcing required Expenditure.*[3]

(G) *Board established in District not maintaining its own Poor.*[4]

(H) *Resolution of Vestry not void by reason of Irregularities in Notices, &c.*[5]

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shall, upon receipt of a certificate under the hands of such number of members of the burial-board as are authorised to exercise the powers of the board, of the sums required from time to time for defraying any such expenses as aforesaid, pay such sums out of the rates for the relief of the poor as the board shall direct."

Sect. 20 "gives a power to borrow money, with sanction of vestry and of the Treasury, and to charge the future poor-rates with the repayment and interest. The 23 & 24 Vic. c. 64, makes further provisions for those contained in the 20 & 21 Vic. c. 81, for the expense of local boards of health and improvement commissioners acting as burial-boards.

[1] 16 & 17 Vic. c. 134, s. 7, extends the above act to burials without the metropolis.

[2] By s. 3, 18 & 19 Vic. c. 128, the churchwardens or other persons to whom it belongs to convene meetings of the vestry of any parish in which no burial-board has been appointed, may at any time, at their discretion, without requisition of ratepayers for that purpose, convene a meeting of such vestry for the purpose of determining whether a burial-ground shall be provided for the parish, and when any order of council has been made, or notice given to apply to the privy council, all the provisions of the said acts, as amended by this act, relating to and consequent upon vestry meetings convened upon such requisition as provided by the first recited act (15 & 16 Vic. c. 85) shall be applicable to vestry meetings convened under this enactment.

[3] By s. 6, "if the vestry of any parish shall refuse or neglect to authorise the expenditure of any such sums as the burial-board of such parish shall have declared to be necessary for providing and laying out a burial-ground and building the necessary chapel or chapels therein, it shall be lawful for such burial-board to represent such refusal or neglect to one of her Majesty's principal secretaries of state; and in case it shall appear to the secretary of state, after inquiry into the circumstances of the case, that the burial-board are unable to provide, &c., or by reason of such neglect, &c., it shall be lawful for the said secretary of state to authorise the board to incur expenses, and to charge them as under the former provisions of the acts."

[4] By s. 5, 20 & 21 Vic. c. 81, "the vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial-ground, may appoint a burial-board; and such vestry or meeting and the burial-board appointed by it shall exercise and have all the powers which they might have exercised and had under the said acts and this act if such parish, new parish, township, or district had had a separate burial-ground before the passing of the said act of 18 & 19 Vic.: Provided always, that all the powers of any other vestry or meeting, and burial-board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid; and until a burial-ground shall be so provided as aforesaid and consecrated for any new parish or district created or to be created pursuant to the 6 & 7 Vic. c. 37, 7 & 8 Vic. c. 94, and 19 & 20 Vic. c. 104, or any or either of them, and to which the said acts or any of them may apply, the incumbent of such new parish or district (if any burial-ground has been or shall be provided under the herein recited acts for the burial of the dead, or any or either of them, for any parish or parishes out of rates to which such new parish or district, or any part thereof, shall have contributed or contribute, or be liable), shall, with respect to the burial in such last-mentioned burial-ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties, have the same rights, privileges, and authorities, and be entitled to the same fees; and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties and be entitled to the same fees in respect of such burials as if the said burial-ground were exclusively the burial-ground of such new parish or district, subject, nevertheless, to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said burial acts, or any or either of them: Provided that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton, without the consent of such incumbent, clerk, or sexton."

[5] By s. 27, "no resolution of any vestry, or meeting in the nature of a vestry, for the purpose of the said recited acts and this act, or any of them, shall be void or voidable by reason of any defect or irregularity of or in notice of such vestry or meeting, or any other error in form in the calling of such vestry or meeting, or in the proceedings thereat, unless notice in writing of such defect, or irregularity, or error shall have been given at such vestry or meeting, or within seven days after the holding thereof, to the churchwardens or other persons to whom it belongs to call meetings of such

(I) *Duties and Powers of Board.*[1]
(J) *Authority of Secretary of State.*[2]
(K) *Construction of Acts.*[3]

vestry, or such meeting in the nature of a vestry, who shall then call another meeting for the purpose of considering the previous resolution or proceedings, or the matter thereof; and no such resolution and proceedings made or taken at any such vestry or meeting in the nature of a vestry, before the passing of this act, which shall not have been objected to by notice in writing to such churchwardens or persons as aforesaid, shall be deemed invalid by reason of any such defect, irregularity, or error."

[1] By s. 24, 15 & 16 Vic. c. 84, burial-boards are to be bodies corporate, by the name of "The Burial-Board for the Parish of," &c. By s. 25, they may provide a burial-ground, which may be either without the parish, and with approval of vestry purchase lands for cemeteries (*see* 20 & 21 Vic. c. 86, s. 26); and may sell lands not wanted, s. 28; and appropriate land belonging to parish, s. 29; and lay out burial-ground or build a chapel for performance of burials according to rites of the Established Church, s. 30; and set apart ground for building chapel, &c. The board may contract for works to be done, but not enter into contracts exceeding 100*l.*, without public notice, s. 31. Burial-ground to be the burial-ground of the parish or parishes in which it is founded, s. 32. It may sell exclusive rights of burial-vaults and rights to erect monuments, s. 33; and to fix rate of payments for interments in burial-ground, vaults, monuments. &c., s. 34.

The 17 & 18 Vic. c. 87, s. 8, enables the council of a borough being a burial-board to fix a higher rate of payment for interments, &c., in respect of outlying parts of any parish partly situate within the borough.

The fees for burials are subject to the approval of the secretary of state (18 & 19 Vic. c. 128, s. 7); and those for burials in the consecrated and unconsecrated portions of the burial-ground must be identical in amount. (20 & 21 Vic. c. 81, s. 17.)

By 23 & 24 Vic. c. 64,—

1. Expenses of local board constituted a burial-board may be paid out of general district rate or by a separate rate.

2. Expenses of improvement commissioners, when acting as a burial-board, may be paid out of improvement rate or by a separate rate.

3. Separate accounts to be kept.

4. And appointments of burial-boards may in some instances be made without consent of the secretary of state.

The 15 & 16 Vic. c. 85, authorising the formation of a burial-board in a parish, is applicable to a parish not having separate overseers nor separately maintaining its poor. The interpretation clause extends the meaning of the word to places not parishes having separate overseers and separately maintaining their own poor, but does not exclude parishes which for any reason do not fulfil those conditions. *Reg. v. Sudbury Burial-Board*, El. Bl. & El. 234.

A mortgagee of a burial ground has notice of the purposes to which it is devoted, and is bound by rights of burial, temporary or in perpetuity, granted by his mortgagor while left in possession. *Moreland v. Richardson*, 24 Beav. 33.

A chapel and a burial-ground adjoining were mortgaged. The mortgagors remained in possession, and afterwards graves were sold in perpetuity to different persons without the concurrence of the mortgagees. The burial-ground was closed by an order of the Queen in council, and the mortgagees thereupon began to level the ground and deface and destroy the tombstones:—*Held*, that the mortgagees were bound by the rights granted, and the court restrained them from doing any act which would prevent the future interment in the family graves with the permission of the secretary of state, and from removing or injuring the graves or the tombstones, and ordered the mortgagees to replace those which had been removed.

[2] As to his power to regulate burial-grounds, *see* 15 & 16 Vic. c. 85, s. 44; 18 & 19 id. c. 116, ss. 7, 8.

By 22 Vic. c. 1, s. 1 (amending sect. 23 of the 20 & 21 Vic. c. 81), where it appears to a secretary of state, on the representation of any person authorised by him to inspect any vaults or place of burial in relation to which an order in council has been or shall have been issued under the 20 & 21 Vic. c. 81, that any acts which by such order in council are ordered to be done by or under the direction of persons other than churchwardens having the care of such vaults or place of burial, are not done or performed within a reasonable time, and according to the intent of such order in council, it shall be lawful for the secretary of state, by writing under his hand, to authorise and direct the churchwardens of the parish in which such vaults or place of burial may be situate, forthwith to complete the acts in such order in council mentioned, or such of them as remain undone; and such order of the secretary of state shall be obeyed by such churchwardens, and they and all persons acting under their direction shall have the same power of entering and doing all such acts upon the premises to which the order in council relates as if the acts had by the order in council been directed to be done by such churchwardens, and such vaults or place of burial had been under their care; and any person who shall obstruct such churchwardens, or any others acting under their direction, in relation to the premises, or remove or interfere with the works done by such churchwardens, shall be guilty of a misdemeanor.

[3] And by sect. 2, the above act and the 20 & 21 Vic. c. 81, and the burial acts therein mentioned, are to be read as one act.

BUSINESS or Trade, Distinctions between.[1]

BYE-LAWS. *See* Carriers, *post*, p. 29; Club; Corporation; Joint-Stock Company; Trade.

C.

CAB Proprietors not Common Carriers.[2]

CABLE. *See* Ship and Shipping, Offences relating to.

CALENDAR.[3]

CALENDAR.[4] *See* Month.

CALF Stealing. *See* Cattle, *post*, p. 52.

CALL to.[5]

CALLING the Plaintiff.[6]

CALLING to Bar. *See* Barrister, vol. ii. p. 373.

CALLS. *See* Joint-Stock Company; Railways.

CAMBRIDGE. *See* Cognisance, Claim of; University, Leases of Lands belonging to; 1 Platt on Leases, 282.

CAMPBELL's, Lord, Act. *See post*, Negligence.

CANAL.[7] *See* Railway and Canal Traffic Act, Carriers, *post*, p. 41; Navigation; Tolls.

(A) *Actions by and against.*[8]

[1] If a covenant provide against the exercise of certain trades or businesses, specifying them as "any other offensive trade," omitting the words "or business," the court will not extend the word "trade" in the latter part of the sentence to the meaning of the word business in the former part, but will treat the word trade as applicable to a dealing by buying and selling only; for every business is not a trade, though every trade is a business. *Doe dem. Wetherell v. Bird*, 2 Ad. & E. 161; S. C. 4 Nev. & M. 285; 6 Car. & P. 175, 201.

[2] A proprietor of cabs which ply for hire is not a common carrier, and is not therefore responsible for the loss of luggage, unless he has failed in taking an ordinary degree of care in respect of it. *Ross v. Hill*, 2 C. B. 877; 15 L. J. C. P. 182. *Brind v. Dale*, 8 C. & P. 207; Add. *Contracts*, 52.

[3] The courts judicially notice the days of festivals appointed by the calendar (*Brough v. Perkins*, 6 Mod. 81), the number of days in a particular month (1 Rol. Abr. 524), that a particular day in the year falls on Sunday (*Hanson v. Shackelton*, 4 Dowl. P. C. 48); the beginning and end of term (2 Ld. Raym. 1557).

[4] By the 13th & 14th Vic. c. 21, s. 4, in all acts the word month shall mean calendar month, unless words be added showing lunar month to be intended.

[5] In America, to designate courses and distances as well as visible objects. 3 Jones' Law R. 496; 11 Gratton's R. 136–157.

[6] A formality practised in courts on the trial of a cause before a jury, as preliminary to nonsuiting the plaintiff. It is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or to withdraw himself, whereupon the crier is ordered to call the plaintiff; and if neither he nor anybody appear for him, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. 3 Bl. Com. 376. Hence, the phrase has become synonymous with nonsuiting the plaintiff. "The plaintiff must be called," that is, must be nonsuited.

[7] Adjacent owners having a right to land goods on banks are entitled to land them on towing-paths. 28 L. J. Ex. 283. *See* 14 Q. B. 81. As to right to take water from canal, *see* 14 id. 122.

[8] The manager of a canal boat having weekly wages may, notwithstanding, maintain trespass against a party for damaging his tackle attached to the boat. *Moore v. Robinson*, 2 B. & Adol. 817. A clause was contained in a canal act, that if the owner of a sunken boat omit to raise it in twenty-four hours, the company should, and charge the expenses to the owner:— *Held* compulsory on the company, and that they were liable to an action for an accident occasioned by the non-removal. *Parnaby v. Lancaster Canal Co.* 11 Ad. & E. 223; 3 Nev. & P. 523.

(B) *Tolls.*[1]

CANAL. Breaking down Bank, Dam, Wall, Quay, Lock, Sluice, Floodgate, &c. 24 & 25 Vic. c. 97, s. 30. *See* Malicious Injuries.

CANAL. Setting Fire to Buildings belonging to. 24 & 25 Vic. c. 97, s. 4. *See* Arson, vol. ii. p. 359.

CANAL. Stealing from Vessels on. 24 & 25 Vic. c. 96, s. 63. *See* Larceny.

CANCELLATION, Effect of.[2]

CANCELLATION of Bills and Notes. *See* vol. ii. pp. 462, 485.

CANCELLATION of Bond. *See* vol. ii. p. 511; *post*, Contract; Deeds; Leases; Wills.

CANON. *See* Dean and Chapter; Ecclesiastical Persons.

CANON LAW.[3]

CAPACITY. *See* Aliens, vol. i. p. 285; Husband & Wife; Lunatic.

A canal company were bound to repair the banks; the owner of the adjoining land dug clay-pits; the banks gave way. In an action for the damage, it is for the jury to say whether the banks were in repair or not; and not whether the banks fell from the digging. *Stafford Canal Company v. Hallen*, 6 B. & C. 317.

A party who assumes the character of a commissioner, and is the trustee for the tolls under a canal act, is liable to a collector for his salary, the collector having been duly appointed by the commissioners. *Tebbits v. Yorke*, 5 B. & Adol. 605; 5 Nev. & M. 609.

[1] Where a canal act imposing a toll for tonnage enacts that no boat of less burthen than twenty tons should pass any lock, &c. without paying tonnage equal to a boat of twenty tons, empty boats will not be liable to such toll. *Leeds and Liverpool Canal Co. v. Hustler*, 1 B. & C. 424; 2 D. & R. 557.

Where by a canal act a toll of 1*l.* per ton, in addition to the ordinary toll, was imposed upon all coal, &c. navigated upon any part of the canal from a particular place, or from any place within two miles thereof, the court held that the act contemplated a voyage commencing within the specific limits. *Brittain v. the Cromford Canal Co.* 3 B. & A. 139.

[2] In order to effect a cancellation of a contract there must be an intention by the parties to cancel it. Where the seals of a deed were torn off by a little boy in sport, it was held that the operation of the deed was not affected thereby. *Argoll v. Cheney*, Palm. 403. But the cancellation will be effectual if the seals are torn off by the agreement of all the parties to a deed, with intent to cancel and annul the instrument. 1 Pres. Shep. T. 69; Burton, s. 443; 2 Bl. Com. 308; 4 Cruise, T. 32, c. 26, s. 18.

An estate or interest in real or personal property which has once vested by a deed cannot be divested by cancelling the deed, because once vested it exists independently of the deed in the person in whose favour it was created, or to whom it was transferred. *See* 4 Cruise, T. 32, c. 26, s. 18. So that any freehold estate or a money fund once absolutely vested by a settlement cannot be divested by merely cancelling the deed creating or transferring it; nor can a lease for years be surrendered by cancelling the indenture of lease (*Lord Ward v. Lumley*, 29 L. J. Ex. 322; 1 Platt on Leases); nor can a lease for years assigned be revested in the assignor by cancelling the assignment. To accomplish the purposes intended by cancelling, the freehold estate must be re-conveyed, the benefit of the settlement must be released, the estate for years must be surrendered, and the leasehold estate must be assigned. But a mere contract or obligation, of which the deed is the essence, may be extinguished by destroying the deed with that intent. Sm. L. of R. and P. P. 735; 2 Jarm. & Byth. by Sweet, 285.

[3] The canon law is founded, partly on certain rules derived from the Scriptures; partly on the writings of the ancient fathers of the church; partly on the ordinances of general and provincial councils; and partly on the decrees of the popes in former ages. It is contained in two principal divisions, the Decrees and the Decretals. The Decrees are ecclesiastical constitutions made by the pope and cardinals. The Decretals are canonical epistles written by the pope, or by the pope and cardinals, at the suit of one or more persons, for the ordering and determining some matter in controversy, and have the authority of a law.

By the 25 Hen. 8, c. 19, revived and confirmed by 1 Eliz. c. 1, it is declared that all canons not repugnant to the king's prerogative, nor to the laws, statutes, and customs of the realm, shall be used and executed.

Lord Hardwicke, in 2 Atk. 605, cites the opinion of *Lord Holt*, and declares it is not denied by any one that it is very plain all the clergy are bound by the canons, con-

CAPIAS ad Respondendum. *See* Arrest on Mesne Process, vol. i. p. 534; and Bail, vol. ii. p. 74.

CAPIAS ad Satisfaciendum.[1] As to the issuing indorsement, *teste*, renewal and succession of the writ, &c. *see* Execution.

I. Forms of Writ, p. 22 n.
II. Against whom it may Issue, p. 25.
(A) *Where Debt less than* 20*l.* p. 25.
III. Arrest, how made, p. 26.
(A) *Detainer, where Defendant in Prison*, p. 26.
IV. What Return made, p. 26.
V. Rescue, p. 26.
VI. Escape, p. 26.
VII. Effect of Arresting the Debtor, p. 27.
VIII. Discharge of Defendant from Custody, p. 27.

I. Forms of Writs of *Ca. Sa.*[2]

firmed by the king only, but they must be confirmed by the parliament to bind the laity. *See* 2 Salk. 412.

The canon laws influence two species of courts: 1st. The courts of the archbishop and bishops, and their derivative officers, usually called courts Christian, or the ecclesiastical courts; 2d. The courts of the two universities, which are either governed by act of parliament or custom (for the peculiar jurisdiction of these courts, *see* Ecclesiastical Courts and University). But the courts of common law have the superintending power over these courts, to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and, in the case of contumacy, to punish the officer who executes, and in some cases the judge who enforces the sentence so declared to be illegal. An appeal lies from these tribunals to the queen, which shows that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate or intrinsic authority of their own. *See* 25 Hen. 8, c. 21. *See* Prohibition.

The laity are not comprehended within the words of the canon of 1603 (*Middleton v. Croft*, 2 Stra. 1057; 4 Vin. Abr. 320; Ca. Temp. Hardw. 57; 2 Atk. 560), since they are in no case, as we have seen, bound, unless the canons be confirmed by the statute or immemorial usage. *Philips v. Bury*, 1 Lord Raym. 7; Holt, 715; Comb. 265; 1 Show. 360.

[1] *You take—to satisfy.* In practice, a writ of execution (usually termed, for brevity, a *ca. sa.*), which a party may issue after having recovered judgment against another in an action at law. It commands the sheriff to take the party named and keep him safely, so that he may have him in court immediately after the execution of the writ, to satisfy the party by whom it is issued the monies recovered by the judgment, with interest thereon.

[2] The following forms of the writ of *ca. sa.* are given in the schedule to Reg. Gen. H. T. 1852. They are numbered in the schedule in the same manner as here:—

No. 15. *Writ of* Capias ad Satisfaciendum *on a Judyment for Plaintiff.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you [*if sued out of the Court of Exchequer*, say, "We command you that you omit not by reason of any liberty of your county, but that you enter the same, and"] take C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ [*the amount of all the moneys recovered by the judyment*], which the said A. B., lately in our Court of Queen's Bench [*or* Court of Common Pleas, *or* Exchequer of Pleas, *as the case may be*], recovered against the said C. D., whereof the said C. D. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum from the day of in the year of, our Lord [*the day on which the judyment was entered up, or if entered up prior to the* 1*st of October*, 1838, say, "from the 1st day of October, in the year of our Lord, 1838," omitting the words, "on which day the judgment aforesaid was entered up"] on which day the judgment aforesaid was entered up, and have you there then this writ.

Witness at Westminster, the day of in the year of our Lord

No. 16. *Writ of* Capias ad Satisfaciendum *on a Judgment for Defendant.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland. Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you take [*if sued out of the Court of Exchequer*, "that you omit not by reason of any liberty of your county, but that you enter the same and take"] A. B., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices, *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy C. D. £ which lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] were awarded to the said C. D., whereof the said A. B. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the day of in the year of our Lord [*the day upon which the judgment was entered up*], on which day the judgment aforesaid was entered up, and have you there then this writ.

Witness, &c.

No. 17. *Writ of* Capias ad Satisfaciendum *on a Rule for Payment of Money.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you, that you take [*if sued out of the Court of Exchequer*, say, "We command you that you omit not by reason of any liberty of your county, but that you enter the same and take"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices, *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ which lately in our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by a rule of our said court, dated the day of in the year of our Lord were ordered to be paid by the said C. D. to the said A. B.; and further, to satisfy the said A. B. interest upon the said sum, at the rate of 4*l.* per centum per annum from the day and year aforesaid [*the day on which the rule was made*], and have you there then this writ.

Witness, &c.

No. 18. *Writ of* Capias ad Satisfaciendum *on a Rule for Payment of Money and Costs.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you take [*if sued out of the Court of Exchequer*, say, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same and take"] C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of the Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ which lately, on the Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], by a rule of our said court, dated the day of in the year of our Lord were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said rule mentioned, which said costs had been taxed and allowed by our said court, at £ [*the amount of the allocatur or allocaturs, if more than one*], and further, to satisfy the said C. D. the said last-mentioned sum, together with the interest upon the said two several sums, at the rate of 4*l.* per centum per annum from the day of in the year of our Lord [*the day on which the costs of the rule were taxed. If interest be claimed on the principal money from the date of the rule, alter the form accordingly*], on which day the said costs were taxed; and have you there then this writ.

Witness, &c.

No. 19. *Writ of* Capias ad Satisfaciendum *on a Rule for Payment of Costs only.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you omit not, by reason of any liberty of your county, but that you enter the same and take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ for certain costs, which by a rule of our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], dated the day of in the year of our Lord were ordered to be paid by the said C. D. to the said A. B., which said costs had been taxed and allowed by our said court at the said sum, and further, to satisfy the said C. D. interest upon the said sum at the rate of 4*l.* per centum per annum from the day of in the year of our Lord [*the day on which the costs of the rule were taxed; or if there have been several allocaturs, the day on which the last allocatur was made*]; and have you there then this writ.

Witness, &c.

No. 20. *Writ of* Capias ad Satisfaciendum

on a Judgment in an Inferior Court removed into one of the Superior Courts.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you take [*if sued out of the Court of Exchequer*, say, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same, and take"] C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ which the said A. B. lately in [*insert the style of the court*], by the judgment of the said court recovered against the said C. D., whereof the said C. D. is convicted, and which judgment was afterwards on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] by virtue of an order of that our said court [*or* of one of the justices of that our said court, *as the case may be*], in pursuance of the statute in such case made and provided; and the costs and charges attendant upon the application for the said order upon the said removal were on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], at £ and further, to satisfy the said A. B. the said £ [*the costs attendant upon the removal of the judgment out of the inferior court into the superior court*], together with interest upon the said two several sums, at the rate of 4*l.* per centum per annum from the said day of in the year of our Lord [*the day on which the costs of removal were taxed*], and have you there then this writ.

Witness, &c.

No. 21. *Writ of* Capias ad Satisfaciendum *on a Rule or Order of an Inferior Court for Payment of Money removed into one of the Superior Courts.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you take [*if sued out of the Court of Exchequer*, say, "We command that you omit not, by reason of any liberty of your county, but that you enter the same and take"] C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ which lately in [*insert the style of the court*], by a rule [*or* order] of the said court entitled [*as the case may be*], were ordered to be paid by the said C. D. to A. B., and which rule [*or* order] was afterwards on the day of in the year of our Lord removed into our Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas] by an order of that our said court [*or* of one of the justices of our said court, *as the case may be*], in pursuance of the statute in such case made and provided; and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were on the day of in the year of our Lord taxed and allowed by our said Court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*], at £ and also to satisfy the said A. B. the said £ the costs of removing the rule from the inferior court into the superior court, together with interest on the said two several sums, at the rate of 4*l.* per centum per annum, from the said day of in the year of our Lord [*the day on which the costs of removal were taxed*], and have you there then this writ.

Witness, &c.

No. 22. *Writ of* Capias ad Satisfaciendum *on a Rule or Order of an Inferior Court for Payment of Money and Costs removed into one of the Superior Courts.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of greeting.

We command you that you take [*if sued out of the Court of Exchequer* say, "That you omit not, by reason of any liberty of your county, but that you enter the same and take"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, before our justices; *or in the Exchequer*, before the barons of our Exchequer, *as the case may be*], at Westminster, immediately after the execution hereof, to satisfy A. B. £ which lately in [*insert the style of the court*] were by a rule [*or* order] of the said court ordered to be paid by the said C. D. to the said A. B., which said rule [*or* order] was afterwards on the day of in the year of Lord removed into our court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] by an order of that our said court [*or* one of the justices of that our said court, *as the case may be*] in pursuance of the statute in such case made and provided; and the costs and charges attendant on the application for the said last-mentioned order, and upon the said removal, were upon the day of in the year of our Lord taxed and allowed by our said court of Queen's Bench [*or* Common Pleas, *or* Exchequer of Pleas, *as the case may be*] at £ and also to satisfy the said £ [*the costs of removing the rule from the inferior court to the superior court*] together with interest on the

II. Against whom it may Issue.[1]

(A) *Where Debt less than 20l.*

Judgment on which issues if in action for debt must exceed 20*l.*[2]

The 7 & 8 Vic. c. 96, s. 57, provides that from and after the passing thereof no person shall be taken or charged in execution upon any judgment obtained in any of her Majesty's superior courts, or in any county court, court of requests, or other inferior court in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment.

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said three several sums, at the rate of 4*l.* per centum per annum, from the day of in the year of our Lord [*the day on which the costs of removing the rule from the inferior court were taxed*], and have you there then this writ.

Witness, &c.

[1] It is a general rule that, where a party may be held to bail under a *capias*, he may be arrested under a *ca. sa.* *Harbert's case*, 3 Rep. 12, a. *See* vol. i. p. 531. An infant (*Gardener v. Holt*, 2 Stra. 1217), or a *feme covert* (*Benyon v. Jones*, 15 Mee. & W. 566. *Newton v. Rowe*, 8 Scott, N. R. 26) may be arrested under it; but in the latter case, if the husband also be arrested, and the wife has no separate property, or if the husband and plaintiff collude to keep her in custody, the court in its discretion may order her discharge. *Edwards v. Martyn*, 17 Q. B. 693. *Larkin v. Marshall*, 4 Ex. 804. *Sparkes v. Bell*, 8 B. & C. 1. *Newton v. Rowe*, 8 Scott, N. R. 26. Members of the royal family, peers and peeresses, and members of the House of Commons during their time of privilege, cannot be taken under it. *Cassidy v. Stewart*, 2 id. 432. *Digby v. Alexander*, 9 Bing. 412. It does not lie against ambassadors or their servants (7 Anne, c. 12, s. 3, *ante*, vol. i. p. 315); nor against servants of the Queen, unless with the Lord Chamberlain's leave (*Bartlett v. Hebbes*, 5 T. R. 686); nor against seamen, marines, or soldiers, unless the debt be 30*l.* or upwards, and was contracted previously to their entering the service (17 & 18 Vic. c. 48, s. 52; id. c. 6, s. 56); nor against coroners or deputy-coroners while actually engaged in the duties of their office (*Ex-parte the Deputy-Coroner of Middlesex*, 30 L. J. Ex. 77); nor against executors or administrators for the debts of their testator, unless a *devastavit* have been returned (Brooke's Abr. Execution, 12. *Ward v. Thomas*, 2 Dowl. 87); nor against corporators nor hundredors (Wats. *Sheriff*, 191, 2d edit.); nor against bankrupts who have received their discharge. *See* vol. ii. p. 340, 341. If a *ca. sa.* be executed in a case where it does not lie, the court or a judge will discharge the prisoner. *Green v. Rohan*, 4 Dowl. 659. *See* generally on this subject, vol. i. p. 531; vol. ii. p. 74.

If a *ca. sa.* be not executed, the plaintiff may sue out contemporaneously a *fieri facias* and an *elegit* to the same sheriff, or into any other county; but if executed, no other writ can in general issue, unless the party die in execution: in which case execution may be sued out against his lands or goods. 21 Jac. 1, c. 24.

[2] See *Walker v. Hewlett*, 6 D. & L. 732. *Harris v. Parker*, 3 Dowl. 451. By s. 124, 15 & 16 Vic. c. 76, the writ is to remain in force for one year, and be renewed if necessary, unless the judge who tries the cause certifies that the defendant has been guilty of fraud, &c. The act extends to a case where a judgment, exceeding 20*l.*, has been subsequently reduced below that amount (*Churchill v. Sygers*, 3 E. & B. 929), but it does not apply to the case of an action on a judgment exceeding 20*l.*, though the action on which it was obtained was for a debt below 20*l.* *Royle v. Consderdine*, Ex.; cited 1 Chit. Arch. 611; 8th edit. *West v. Jarlar*, 28 L. J. Q. B. 81; 1 E. & B. 179. It applies to a case on which judgment has been entered upon a warrant of attorney confessing judgment for 500*l.*, where the arrears of an annuity for which it was entered up are less than 20*l.* *Johnson v. Harris*, 15 C. B. 357. And if party be arrested trespass lies, though writ be not set aside. 29 L. J. Ex. 93; 4 H. & N. 712.

If judgment is recovered for a sum exceeding 20*l.*, but the amount of the debt is subsequently reduced below that amount by payment, the defendant may be taken under a *ca. sa.* for such residue, notwithstanding this statute. *Holbert v. Starkey*, 4 H. & N. 125. *Sed vide Hodges v. Callaghan*, *infra.*

Where the plaintiff, the author of a dramatic piece, recovered six sums of 40*s.* in an action of debt for as many performances of his piece without his consent, this was held to be a debt within the statute. *Fitzball v. Brooke*, 6 Q. B. 873; 2 D. & L. 477.

And where the defendant was served with a writ specially indorsed under the 15 & 16 Vic. c. 76, s. 25, for 36*l.* for debt and costs, and he agreed to pay that amount by instalments, and after he had paid four, by which the sum was reduced to 12*l.*, the plaintiff, upon his making default, signed judgment under sect. 57, and took him in execution, he was held entitled to be discharged on the ground that the sum recovered was under 20*l.* *Hodges v. Callaghan*, 29 L. T. 79; 26 L. J. C. P. 171. See *Blow v. Steinan*, 11 Ex. 440. This statute is applicable only to execution on a judgment obtained against a defendant, and not to a case where the defendant has obtained the judgment against the plaintiff. See *Newton v. Lord Conyngham*, 5 C. B. 749; 5 D. & L. 762.

III. Arrest, how made.[1]

(A) *Detainer, where Defendant in Prison.*[2]

IV. What Return made.[3]

V. Rescue.[4]

VI. Escape.[5]

[1] As to the arrest, any touching of the defendant's person, however slight, is an arrest. Bull. N. P. 62. *Sandon v. Jervis*, 27 L. J. Q. B. 279; 28 id. 156. *See* 2 H. & N. 605; 1 E. & B. 935. And although bare words will not make an arrest (*Genner v. Sparkes*, 1 Salk. 79), yet if the party is under restraint, and the officer manifests an intention to make a capture, it is not necessary that there should be actual contact. *Williams v. Jones*, Hard. 301. *Russen v. Lucas*, 1 Car. & P. 153. *Grainger v. Hill*, 4 Bing. N. C. 212. *See ante*, vol. i. p. 536. At the time of the arrest the warrant should be produced, or the party arrested made aware of it. *Robins v. Hender*, 3 Dowl. 543. Upon an arrest in execution, the defendant may be taken at once to the county gaol. *Evans v. Atkins*, 4 T. R. 555. In practice, he is usually taken to the house of the sheriff's officer. See *Houlditch v. Birch*, 4 Taunt. 608. Where the arrest is illegal, the sheriff cannot detain the party in custody under another writ (*Hooper v. Lane*, 10 Q. B. 545; S. C. 17 L. J. Q. B. 189; H. L. 27 id. 75. *Barratt v. Price*, 9 Bing. 569. *Ockford v. Preston*, 30 L. J. Ex. 89); but if the irregularity arise from no default on his part, the defendant may be detained under a writ or warrant at the suit of another party, but not of the party at whose suit he was originally arrested. *Eggington's case*, 2 E. & B. 718.

[2] If the defendant is already in the prison of the county, he is charged in execution by a judge's order, made upon affidavit that judgment has been signed and is not satisfied; and the service of such order on the keeper of the prison has the effect of a detainer. 15 & 16 Vic. c. 76, s. 127.

Where a *ca. sa.* was lodged with the sheriff, accompanied by a direction that the sheriff was not to execute it until further notice, and subsequently the defendant was taken in execution at the suit of another creditor, and paid the debt; the officer detained defendant until instructions were obtained from the plaintiff, who thereupon directed the defendant to be discharged:—It was held, the defendant had never been arrested under the *ca. sa.* at the suit of the plaintiff, and that the judgment-debt was therefore subsisting. *Semple v. Keen*, 3 H. & N. 753; 28 L. J. Ex. 151.

[3] The sheriff, if he has taken the defendant, returns that fact, stating in what prison he is (*R. v. Sheriff of Wilts*, 1 Bing. 423), or that he is so ill that he cannot be removed without endangering his life. *Jones v. Robinson*, 11 Mee. & W. 758. *Cavenagh v. Collett*, 4 B. & A. 280. If the sheriff has not been able to find the defendant, he returns *Non est inventus*. *Key v. Mackyntire*, 5 Dowl. 453. If he could not take him on account of privilege, he may return the exemption. *Jorge v. Herrick*, Dough. 675; Wats. *Sheriff*, 196, 2d edit. If the return be false, an action lies against the sheriff; and it is false if the defendant go about openly, and the under-sheriff in the county, or the bailiff to whom the writ was directed, have notice thereof, and *Non est inventus* is returned. *Beckford v. Montagu*, 2 Esp. 475. *Gibson v. Coggon*, 2 Camp. 189. *Dyke v. Duke*, 4 Bing. N. C. 197. *See* False Return.

[4] The sheriff cannot excuse himself by returning a rescue, as he may in the case of mesne process, unless the rescue were by the king's enemies. *Howden v. Standish*, 18 L. J. C. P. 33. If the defendant be rescued, the plaintiff has his action against the sheriff or the gaoler in whose custody he was (*Covington v. Ward*, 1 Stra. 409. *O'Neil v. Marson*, 5 Burr. 2812), or sue out fresh execution against either the goods or person of the debtor. *Mounson v. Cleyton*, Cro. Car. 240. *Drury's case*, 8 C. 142.

[5] An escape is where a person under lawful arrest and restraint evades such arrest and restraint, or is suffered to go at large before being delivered by due course of law. Bac. Abr. 122. If he is suffered to go about, though in custody of an officer, it is an escape. *Benton v. Sutton*, 1 B. & P. 24. *Hawkins v. Plomer*, 2 W. Black. 1048. Unless it be under a *habeas corpus*, or the order of a court of competent jurisdiction, or in a foreign county, where he is watched day and night by the sheriff's bailiff. *Mas v. Davis*, 4 C. B. 444. If the sheriff receive the debt, and before payment to the plaintiff liberate the defendant, it is an escape. *Crozer v. Pilling*, 4 B. & C. 31. It is no escape if the sheriff or gaoler liberate the prisoner on the written order of the plaintiff's attorney in the cause, unless the plaintiff has given him notice to the contrary, 15 & 16 Vic. c. 76, s. 126, *ante*, n. 2. Neither is it an escape if the custody was unlawful. *Lane v. Chapman*, 11 Ad. & E. 966. If the escape be negligent, fresh pursuit may be made, and the defendant retaken. *Filewood v. Clement*, 6 Dowl. 508. If he was in custody of the keepers of the Queen's prison, an escape warrant may be obtained by application to a judge at chambers, and the defendant may be retaken under it in any part of England. 1 Anne, c. 6; 5 Anne, c. 9. *Anderson v. Hampton*, 1 B. & A. 608. But if the escape be voluntary, *i. e.* with the express consent of the sheriff or officer, &c., even though he were acting under a mistake, he can never retake the defendant. *Filewood v. Clement*, 6 Dowl. 508. The sheriff, bailiff, or other person having the

VII. Effect of Arresting the Debtor.[1]

VIII. Discharge of Defendant from Custody.[2]

custody of the defendant at the time of the escape is liable to an action on the case for damages sustained by the person at whose suit the defendant was taken, but not now, as formerly, to an action of debt. 5 & 6 Vic. c. 98, s. 31. And after paying the debt, he has no remedy over against the defendant if the escape was voluntary. *Pitcher v. Bailey*, 8 East, 171. *Gillott v. Aston*, 2 Dowl. N. S. 413.

Though a relaxation of custody by the sheriff without the judgment-creditor's consent may be a discharge of the debtor, yet if both creditor and prisoner consent that it shall be no discharge, the prisoner is estopped from claiming a discharge on this ground. The sheriff should, however, for his own protection, obtain a rule of court in such a case. *Haines v. East India Co.* 28 L. T. 165. *See post*, Escape.

[1] The effect of taking the defendant in execution under a *ca. sa.* is, that it operates as a satisfaction of the debt, so that the creditor has no other remedy on the judgment to recover it, except the party taken either dies or escapes, or obtains his discharge by fraud. *Baker v. Ridgway*, 9 Moore, 114. *Taylor v. Waters*, 5 M. & S. 103. *Bevan v. Robins*, 8 D. & R. 42. *Beard v. M'Carthy*, 9 Dowl. 136. *Morgan v. Cubitt*, 3 Ex. 615. *Lambert v. Parnell*, 10 Jur. 31. *Cutler v. Kerrick*, 27 L. J. C. P. 186. And even where the creditor consented to the debtor's discharge, on the understanding that if certain terms then agreed upon were not performed he might be recaptured, it was held that neither a second arrest nor the issuing of any other writ of execution could be justified. *Blackburn v. Stupart*, 2 East, 243. *Tanner v. Hague*, 7 T. R. 420. So if the creditor discharges one of two joint debtors, this will operate as a discharge of both. *Ballam v. Price*, 2 Moore, 235. *Clarke v. Clement*, 6 T. R. 525. *Vigers v. Aldrich*, 4 Burr. 2483. See *Raynes v. Jones*, 9 Mee. & W. 104. A petition in bankruptcy cannot be filed against the debtor for the same debt. *M'Master v. Kell*, 1 B. & P. 302. *Cohen v. Cunningham*, 8 T. R. 123. See *Watson v. Humphrey*, 24 L. J. Ex. 190. Where a plaintiff issued a *ca. sa.* indorsed to levy the sum for which the action was brought, and the defendant was arrested upon it, it was held that a second *ca. sa.* could not issue for the costs. *Smith v. Dickinson*, 5 Q. B. 602. But although taking the body in execution bars the remedy against the debtor, yet it does not extinguish the debt. *Thompson v. Parish*, 5 C. B. 685; 28 L. J. C. P. 153. A creditor who has taken his debtor in execution, cannot avail himself of his judgment-debt by way of set-off when sued by the judgment debtor for a separate and distinct matter. *Taylor v. Waters*, 5 M. & S. 103. But where the costs sought to be set off do not arise out of a distinct matter, but are interlocutory costs, which, were the debt not in execution, might clearly be set up, the court will, if the execution-debtor is not prejudiced with reference to such costs by having been taken in execution, allow the judgment-creditor to set them off. *Thompson v. Parish*, 28 L. J. C. P. 153. *See* Costs; and Marshall, 302.

The plaintiff is not barred by having executed a *ca. sa.* from taking out execution against other persons liable to the same debt and damages. *Bircham v. Tucker*, 3 Scott, 469. *Foster v. Jackson*, Hob. 57.

By the 2 Jac. 1, c. 13, "if any person being arrested in execution, and by privilege of either of the Houses of Parliament set at liberty, the party at whose suit such writ of execution was pursued, his executors or administrators, after such time as the privilege of that session of parliament in which such privilege shall be so granted shall cease, may sue forth and execute a new writ or writs of execution, as if no such former writ of execution had been taken forth or served. See *Barrack v. Newton*, 1 Q. B. 533. *Baker v. Ridgeway*, 9 Moore, 122.

It seems that, after an arrest and discharge on the ground of any other privilege, a party can be again arrested after the privilege has expired. *Towers v. Newton*, 1 Q. B. 319. *Phillips v. Price*, 1 D. & L. 110. So if he obtains a temporary protection from process (*Parker v. Bailey*, 17 L. J. Q. B. 45; 5 D. & L. 296. And if a defendant be discharged out of custody on the ground of an irregularity in the writ, he may be again taken on a regular writ. *Merchant v. Franks*, 3 Q. B. 1. See *M'Cormick v. Melton*, 3 Dowl. 215; 1 C., M. & R. 525. *Collins v. Beaumont*, 10 Ad. & E. 225. *Mackie v. Warren*, 5 Bing. 176; 2 M. & P. 279. And if the defendant obtain his discharge by fraud, and after the discovery of the fraud he is arrested on a fresh *ca. sa.*, the court will not order his discharge. *Baker v. Ridgeway*, 2 Bing. 41; 2 Moore, 122.

By the 8 & 9 Wm. 3, c. 11, where breaches are assigned in debt on bond conditioned to perform covenants, the defendant may, in case of further breaches, be taken in execution a second time upon the original judgment. *Atkinson v. Bayntun*, 1 Scott, 404; 1 Hodges, 7; 1 Bing. N. C. 444. See *Smith v. Dickenson*, 1 D. & L. 158.

[2] The defendant is entitled to be discharged upon satisfaction of the judgment. The payment should be made to the plaintiff or his attorney on the record (*Morton's case*, 2 Show. 139. *Savory v. Chapman*, 11 Ad. & E. 829); for if made to the sheriff or his officer, or to the keeper of the Queen's prison, it is not deemed a payment to plaintiff, and is not, therefore, a satisfaction of the judgment. *Woods v. Finnis*, 7 Ex. 363. *Connop v. Challis*, 2 id. 484. *Sluckford v. Au tin*, 14 East, 468. *Hemming v. Hale*, 29 L. J. C. P. 137; 7 C. B. 187. The defendant is not entitled to be discharged because the plaintiff has died and there is no personal representative. *Taylor v. Burgess*, 16 Mee. & W. 781. Countermand of Arrest, *see* 27 L. J. Ex. 19; 28 id. 28.

The sheriff is justified in discharging the debtor upon written order of creditor's attorney.

By 15 & 16 Vic. c. 76, s. 126, "a written order under the hand of the attorney in the cause by whom any writ of *ca. sa.* shall have been issued, shall justify the sheriff, gaoler, or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor; and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client."

CAPIAS in Withernam. *See* Replevin.

CAPIAS to hold to Bail. *See* vol. i. p. 525.

CAPIAS Utlagatum. *See* Outlawry.

CAPTION to an Indictment.[1]

CAPTION to Depositions.[2]

CAPTURE.[3] *See* also Insurance Marine; Shipping.

CARDS. *See* Gaming.

As the defendant when arrested is considered to be in custody upon all the writs in the sheriff's hands, search should be made, before discharging him, in the sheriff's office, to ascertain whether there be other writs against him. *Samuel v. Buller*, 1 Ex. 439. *Wright v. Stamford*, 1 Dowl. N. S. 272.

By the 48 Geo. 3, c. 123, persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, exclusive of the costs recovered by such judgment, who have lain in prison thereupon for the space of twelve calendar months, are upon application to be discharged. This statute applies to an action of ejectment, where the defendant is in execution for the costs. *Humphreys v. Franks*, 27 L. J. C. P. 114; 22 Jur. 241.

By Reg. Gen. (Pr.) H. T. 1853, r. 128, it is ordered, that "after notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any act for the relief of insolvent debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the courts, from the time of such notice given until some rule or order shall be made in the cause in that behalf." *Sed vide* 24 & 25 Vic. c. 134; vol. ii. p. 141. And by rule 129, "a rule or order for the discharge of a prisoner who has been detained in execution for a sum under 20*l.*, may be made absolute, in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." This notice should be served on the plaintiff himself, not on the attorney. *Johnson v. Rutledge*, 5 Dowl. 579. *Harris v. Turtle*, 8 Mee. & W. 258. The court grants the rule absolute in the first instance. *Cook v. Beardsall*, 9 W. R. Ex. 790.

[1] The caption is the formal preamble to an indictment, when it is removed by *certiorari* from an inferior court to the Queen's Bench, or when the record is made up; but it is no part of the indictment itself. It is essential that it should show that the indictment was taken before a court which has proper jurisdiction. By the 14 & 15 Vic. c. 99, it is not necessary that a certificate of conviction or acquittal should set out the formal parts. For the form of a caption, *see post*, Indictment.

[2] In the case of depositions taken before magistrates, one caption at the head of the whole body of depositions will suffice. *R. v. Jack*, 2 C. & Kir. 355.

[3] Capture is the taking of the ship or goods by an enemy of the country to which the ship and goods belong when in a state of public war. Capture, when lawful according to the law of nations, presupposes a state of war, and can only be effected by persons duly authorised by one of the belligerent states; and although the capture be lawful, yet no property vests in the captors until the vessel has been taken into a port of the belligerent states or of an ally in the war, and has been duly condemned by a court of competent jurisdiction exercising its functions within the same country. Prize, or booty of war, is the property of the sovereign. The right of a subject of Great Britain to capture for his own benefit must be derived from the Crown; and is conferred by an express commission, called letters of marque or reprisal, which only confer the property in prize belonging to the belligerent power against whom the letters are granted. Le Grand Terrein, Hay & Mar. Adm. 155; La Bonne Amitié, id. 160; La Mignone, id. 221; The Xavier, id. 219; Twee Gesuster, 2 C. Rob. Ad. 284. If the capture either precede the commencement or follow the cessation of hostilities by ever so little, no property is thereby acquired, and the original owner is not divested of his right. The Somerset Metherell, 2 Dod's Ad. 56; The Harmony, Norman, 2; The Sarah and Bernhardus, Hay & Mar. Adm. 175.

The plenipotentiaries of Great Britain, Austria, France, Russia, Sardinia, and Turkey, signed a declaration at Paris, on the 16th of April, 1856, "that as to these powers, *inter alia*, privateering is and remains abolished."

CARGO. *See* Bill of Lading, vol. ii. p. 490; *post*, Charter-party, p. 79; Freight; Insurance; Ship and Shipping.

CARNAL Knowledge. *See* Rape.

CARNALLY knowing a Girl under Ten Years of Age. *See* Assault, vol. i. p. 567; *post*, Rape.

Carnally knowing a girl under ten years of age.

By stat. 24 & 25 Vic. c. 100, s. 50, "whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony; and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

Carnally knowing a girl between the ages of ten and twelve.

By stat. 24 & 25 Vic. c. 100, s. 51, "whosoever shall unlawfully and carnally know and abuse any girl, being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor; and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

CARRIERS.[1] *See* also Freight; Innkeeper; Ship and Shipping.

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I. The Nature and Extent of the Obligations of Common Carriers at Common Law.

(A) *Who are Common Carriers.*[1]

[1] A common carrier is one who undertakes for hire to transport the goods of such as require to employ him from place to place (1 Salk. 249), whether within or without the realm. *Crouch v. the North-Western Railway Co.* 23 L. J. C. P. 73. Of this description are the proprietors of stage-waggons and coaches which carry goods for hire ; lightermen (*Ingate v. Christie*, 3 C. & Kir. 61), hoymen, barge-owners, ferrymen. A ferryman, however, seems not to be in the situation of a common carrier ; at all events, where he takes the passengers along with the goods. *Payne v. Partridge*, 1 Show. 257 ; 1 Salk. 12. *Walker v. Jackson*, 10 Mee. & W. 161. Canal-boatmen, owners and mas-

(B) *Obligation with Reference to the Receiving of Goods for Carriage.*[1]

ters of ships, engaged generally in the transportation of goods for hire, and other persons owning similar instruments of public conveyance, are carriers. 2 Ld. Raym. 909, 18; 5 T. R. 27; Bac. Ab. Carriers, A. *Morse v. Slue*, 2 Lev. 69. *Rich v. Kneeland*, Cro. Jac. 330. *Maving v. Todd*, 1 Stark. 72. *Brook v. Pickwick*, 4 Bing. 218. *Lovett v. Hobbs*, 2 Show. 128. *Upshare v. Aidee*, Com. 25. *Butterton v. Wood*, 3 B. & B. 54. *Pozzi v. Shipton*, 8 Ad. & E. 963. A stage-coach-owner who carries passengers *only* is not, properly speaking, a common carrier: he does not warrant the safety of the passengers at all events; but only that so far as human care and foresight will go he will provide for their safe conveyance. *Aston v. Heaven*, 2 Esp. 533. *Christie v. Griggs*, 2 Camp. 79. *White v. Boulton*, Peake, 81. *Robinson v. Dunmore*, 2 B. & P. 416. See *Sharp v. Grey*, 9 Bing 457. Nor is a town carman not plying between certain termini, but undertaking casual jobs. *Brind v. Dale*, 2 M. & Rob. 80. Railway companies are common carriers with regard to the goods which they convey. *Johnson v. Midland Railway Co.* 4 Ex. 367. *Oxlade v. North-Eastern Railway Co.* 1 C. B. (N. S.) 673; 26 L. J. C. P. 129. But their duties and obligations in this respect differ by virtue of statutes under which they are constituted, and of other acts, particularly the Railway and Canals Traffic Act, from those which attach to other carriers.

The postmasters and deputy-postmasters are not liable as common carriers. *Lane v. Cotton & another*, 1 Salk, 17; Ld. Raym. 646; 5 Mod. 445; 12 Mod. 482; Carth. 487; Holt, 582; Com. 100.

An action was, therefore, holden not to lie against the postmaster-general for a bank-note stolen by one of the sorters out of a letter delivered into the post-office; but it was decided that the postmaster and all his inferior officers were responsible for *their own personal* negligence. *Whitfield v. Lord Le Despencer*, Cowp. 754.

A deputy-postmaster was consequently considered liable for the non-delivery of a letter. *Rowning v. Goodchild*, 3 Wils. 443; 2 Bl. 906. *Smith v. Powditch*, Cowp. 182. *Smith v. Dennis*, Lofft. 753.

[1] The duty of a common carrier is to carry the goods of all persons offering (for there need not be an actual tender; *Pickford v. Grand Junction Railway Co.* 8 Mee. & W. 372) to pay his hire (*Jackson v. Rogers*, 2 Show. 329; Bac. Abr. Carriers, B. *Riley v. Horne*, 5 Bing. 217. *Parker v. the Great Western Railway Co.* 7 Man. & G. 253), unless, indeed, his carriage be full, or the goods are of such a kind to be liable to extraordinary danger (*see* 8 & 9 Vic. c. 20, s. 15), or such as he is unaccustomed or unable to convey. *Johnson v. Midland Railway Co.* 4 Ex. 367. *Jackson v. Rogers*, 2 Show. 327; 1 Saund. 312, n. *Lane v. Cotton*, 1 Ld. Raym. 646. *Edwards v. Sherratt*, 1 East, 604. *Lovett v. Hobbs*, 2 Show. 128. *Batson v. Donovan*, 4 B. & A. 21.

The obligations of railway companies as to the receiving of goods for carriage does not appear to be more extensive. The Railway Clauses Consolidation Act does not impose an *obligation* upon the company to carry goods. *See* 8 & 9 Vic. c. 20, s. 86. *Johnson v. Midland Railway Co.* 4 Ex. 367. Neither do the special acts of the company in general contain any such mandate. *Oxlade v. North-Eastern Railway Co.* 9 W. R. 272. But by acting as common carriers they incur the obligations the law attaches to that business; and will be bound to receive any goods they have made a practice of carrying upon tender of the hire: so, as to local limits, their obligation is to carry between such places as they are used and profess to convey goods between as common carriers, whether such places be within or beyond the limits of their line. *Muschamp v. the Lancaster and Preston Junction Railway Co.* 8 Mee. & W. 421. *Collins v. Bristol and Exeter Railway Co.* 11 Ex. 790; in error, 29 L. J. Ex. 44. *Johnson v. Midland Railway Co.* 4 id. 367, in which *Parke, B.*, referring to the 86th sect. of the Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, said:—"I think it shows that no obligation is cast on the company to undertake the duties of carriers altogether and on every part of their line, but that they may carry some goods on one part of their line and not on others, and they may afterwards relinquish the business if they please, though it is not necessary to determine that point now. There is nothing which induces me to think that we ought to give a different construction to the 86th section, which only enables, not obliges, the company to be carriers."

The sender of the goods ought to take care that they are packed and secured with reasonable security, having regard to the character of the goods and the nature of the journey. See *Munster v. South-Eastern Railway Co.* 27 L. J. C. P. 308.

Railway companies are bound to receive packed parcels, *i. e.* a package addressed to one consignee containing a quantity of parcels addressed to different persons; and they are not justified in demanding any higher rate on account of the nature of such a package. *Crouch v. the Great Northern Railway Co.* 25 L. J. Ex. 137. *Parker v. Great Western Railway Co.* 11 C. B. 545. *Edwards v. Great Western Railway Co.* id. 588. *Crouch v. Great Northern Railway Co.* 6 Ex. 556. Neither are they justified in opening such a package with a view to ascertain whether it consists of packed parcels. *Crouch v. London and North-Western Railway Co.* 2 C. & Kir. 789.

Should the carrier decline to receive goods tendered for carriage without a reasonable ground for the refusal, the money for the carriage of which has been paid or tendered, he will be liable to an action. *Crouch v. London and North-Western Railway Co. supra. Parker v. Great Western Railway Co.* 7 Man. & G. 253. In this action the owner will be

(C) *The Hire demanded must be Reasonable.*[1]
(D) „ „ *Uniform.*[2]
(E) *Classification of Goods in Railway Acts in Reference to Tolls.*[3]

entitled to recover the increased charges to which he may have been put in sending them by another conveyance. But he is not entitled to claim profits which he has lost by the delay in so transmitting the goods by a more circuitous route, or a slower conveyance; such loss of profits being excluded on the principle that, as a head of damage, such loss is too remote. *Crouch v. Great Northern Railway Co.* 11 Ex. 742. *See post*, p. 40, n. 4.

Where goods are to be conveyed by a common carrier, they should regularly be left at the usual booking-office, and entered there and paid for (*Buckman v. Levi*, 3 Camp. 414): it having been held that the mere leaving of goods at an inn-yard, from whence a carrier sets out, is no delivery to the carrier. *Selway v. Holloway*, 1 Ld. Raym. 46. So where a quantity of goods were left at a wharf, piled up among other goods, with a direction to the consignee, but no person belonging to the wharf fixed with a privity of their being left there, the delivery was holden of no avail. *Buckman v. Levy*, 3 Camp. 414. The delivery of a parcel to the driver of a stage-coach is, however, a sufficient delivery to render the master liable (*Williams v. Cranston*, 2 Stark. 82. *Gouger v. Jolly*, Holt, N. P. C. 317); drivers of coaches, porters, and warehouse-receivers, even though they receive a separate charge for their trouble, being the carrier's servants. *Hyde v. the Trent and Mersey Navigation Co.* 5 T. R. 389.

It has been holden that the delivery, if otherwise complete, will not be affected by the fact of a person travelling in the conveyance in which the property is carried, and having his eye on the goods during the journey. *Robinson v. Dunmore*, 2 B. & P. 419. *Clark v. Gray*, 4 Esp. 177. It is, nevertheless, clear, that where a party refuses to place any trust or control in the carrier, as by sending his servant with the goods, and no evidence of a direct bailment exists, no duty will arise, or liability attach. *East India Company v. Pullen*, 1 Stra. 690. But a carrier may, of course, undertake specially for the safe delivery of such goods, and such contract will be commensurate with his general responsibility. *Robinson v. Dunmore*, 2 B. & P. 416.

[1] With regard to the remuneration to which a carrier is entitled, he must carry for a reasonable amount; and if he insist on receiving more before conveying the goods, or before parting with them, an action for money had and received will lie against him for the excess. *Parker v. Great Western Railway Co.* 7 Man. & G. 253. *Crouch v. the London and North-Western Railway Co.* 2 C. & Kir. 789. See *Pickford v. G. J. R.* 8 Mee. & W. 399. *Ashmole v. Wainwright*, 2 Q. B. 837.

What is such reasonable amount appears to be a question for the jury. *Ashmole v. Wainwright, supra.* But where the goods are of extraordinary danger, or carried under peculiar circumstances, it may possibly be in his option to insist upon a special contract. See *Wyld v. Pickford*, 8 Mee. & W. 443.

The hire demandable by railway companies is regulated by the special act incorporating the particular railway. If the act leaves the charge for any particular description of goods in the discretion of the company, it has been said that it must be exercised in a reasonable manner, and that the rates imposed will not be binding on the public if unreasonable. See *Alderson, B.*, in *Crouch v. Gt. Western Railway Co.* 11 Ex. 742.

[2] The hire demanded by a carrier, we have seen, must be reasonable, and ought to be uniform: that is, he must not charge more to one customer or class of customers for any service than he charges for the same service to another customer or class of customers, or to the public generally. *Parker v. Great Western Railway Co.* 7 Man. & G. 253. *Edwards v. the Great Western Railway Co.* 11 C. B. 588. *Pickford v. the Grand Junction Railway Co.* 10 Mee. & W. 399. In addition to this common-law obligation, railway companies are subject to a statutory duty to regulate their tolls without partiality to any particular individual or species of traffic. *See* the Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, s. 90; and the Railway and Canal Traffic Act, 17 & 18 Vic. c. 31, s. 2, *post*, p. 41.

[3] The special act of railway companies generally contains a provision authorising the company to charge for the carriage of goods after certain rates, according to a classification in which regard is had to the nature of the commodities, and the degree of care and amount of responsibility annexed to their carriage. The companies are bound to adhere to such scale, or to the classification they promulgate. They cannot, in favour of any particular customers, charge goods as falling within one class, which they charge to others as falling within a different class; and any excess of charge from this cause they will be bound to refund. *Edwards v. Great Western Railway Co.* 11 C. B. 588.

Where the term "Manufactured Goods" occurred in the classification, it was said that it ought to be taken in a popular sense, and meant not merely goods produced from the raw state, but such as are ordinarily produced in manufactories. Acting upon this construction, the court said that the words would exclude stationery, and include shoes, ironmongery, glass, and drapery. *Parker v. Great Western Railway Co.* 6 E. & B. 77.

Where the highest class consisted of "Miscellaneous Goods," it was held that where a number of packages of goods of the same class but of different kinds was sent, and a tonnage rate was applicable, such tonnage rate should be according to the class of

(*a*) *Packed Parcels.*[1]

(F) *Obligations during Transit.*[2]

goods within which the goods fell, and that the railway company could not charge for them as "miscellaneous," according to the higher rate allowed in the case of "miscellaneous goods." *Edwards v. Great Western Railway Co.* 11 C. B. 588.

As to parcels' rates, that is, the rate applicable to parcels under a specified weight. Where by the special act the company were to be at liberty to charge for small parcels, and after what rates they should think fit, and small parcels were described as parcels not exceeding 500lbs. each, and the section contained a proviso that "articles sent in large aggregate quantities, although made up of several parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages;" the question was raised whether a number of packages consigned to the same consignee, each less than 500lbs., and all of them being articles of a similar class (such as drugs, drapery, glass and stationery, which were in class four), could be charged for according to the parcels' rates, and ought not to be charged for according to the tonnage rates on the aggregate quantity. The court held that the company were justified in charging the parcels' rate. It follows from the proviso that several parcels, each being a separate package, could not constitute one small parcel within the act; and if they formed each a small parcel, there was nothing in the act which compelled the company to charge for them as one, according to the aggregate weight, although it fell short of 500 lbs. *Parker v. Great Western Railway Co.* 6 E. & B. 77; 25 L. J. Q. B. 209. But see *Parker v. Great Western Railway Co.* 11 C. B. 253.

[1] It is the business of some carriers to collect small parcels in large towns and then to make them into one large package, containing all those addressed to different persons at a particular place, to which they forward them by railway, addressed to their agent there, who delivers them to the various consignees. Such packages must be charged for according to the rates ordinarily applicable to packages of a similar weight; and no extra charge can be justified on the ground of their being so collected and forwarded, there being nothing either in the nature of the contents of such a package, or of the risk incurred with respect to it, justifying a departure from the ordinary scale, or the demand of any greater charge than what is made to other customers. *Crouch v. the Great Northern Railway Co.* 9 Ex. 556. *Crouch v. the Great Western Railway Co.* 25 L. J. Ex. 137.

[2] The carrier is bound to take proper care of the goods in their passage, and to make a safe and right delivery of them at the time agreed upon, or in the absence of any stipulation in that respect, within a reasonable time. *Streeter v. Horlock*, 1 Bing. 34. *Hyde v. Trent and Mersey Navigation Co.* 5 T. R. 389. *Ellis v. Turner*, 8 id. 531. *Davis v. Garrett*, 6 Bing. 716. *Raphael v. Pickford*, 5 Man. & G. 551.

The responsibility as common carriers commencing with the receipt of the goods, in that character continues until the carrier has discharged his duty as such with respect to them. Although warehoused by the carrier for his own convenience, at an intermediate warehouse on the route, the responsibility continues. *Garside v. the Trent and Mersey Navigation Co.* 4 T. & R. 581. Upon the arrival at the place of destination, if the consignee is to fetch them away, then his responsibility as carrier will cease with their arrival there, and if warehoused for the convenience of the consignee, he will be liable as warehouseman only. Story's Bail. s. 539. If their duty be to deliver to the consignee, then the responsibility continues until such delivery is made. And so where goods are warehoused at the end of the journey which the carrier has undertaken, and previously to forwarding the goods by another conveyance, where so warehoused for the convenience of the owner, the carrier is responsible as warehouseman only. *Garside v. the Trent and Mersey Navigation Co.* 8 T. R. 581. *In re Webb*, 8 Taunt. 443. *Thomas v. Boston and Providence Railway Co.* 10 Metcalf, 472, Am. R.

At common law, the carrier stands in the situation of an insurer of the property intrusted to him, and is answerable for every loss or damage happening to it while in his custody, no matter by what cause occasioned, unless it were by the act of God; such as a tempest, or that of the king's enemy. In other cases, even his entire faultlessness does not excuse him: thus, he is liable for damage done by accidental fire, or by a robbery. *Dale v. Hall*, 1 Wils. 281; 1 Inst. 89. *Covinton v. Wilan*, Gow, 115. *Collins v. Bristol and Exeter Railway Co.* 11 Ex. 790; 29 L. J. Ex. 48. And it is no defence that they have delivered the goods to the wrong person in consequence of a forged order. Story's Bail. s. 574. *Devereux v. Barclay*, 2 B. & A. 702.

The *onus* of proving that damage happening during transit, or while the goods were in his hands, was occasioned by a cause for which he was not responsible, lies upon the carrier. *Hudson v. Baxendale*, 2 H. & N. 575.

If, however, there is any fraud or unfair concealment by the sender of the goods, it will exempt the carrier from responsibility under the contract, or, more properly speaking, it will make the contract a nullity. *Batson v. Donovan*, 4 B. & A. 21. *Edwards v. Sherratt*, 1 East, 604. *Tichburne v. White*, 1 Stra. 145. Thus, where notes to the amount of 100*l.* were packed in an old mail-bag, stuffed with hay, to give it a mean appearance, and the bag arrived safe, but the

(G) *Obligations with Respect to the Delivery of the Goods.*[1]

notes were stolen, this concealment was held to be such a fraud upon the carrier as to discharge him from all responsibility for the loss. *Gibbon v. Paynton*, 4 Burr. 2298. And wherever the owner represents the package to be of a particular value, he will not be permitted, in case of loss, to recover from the carrier anything beyond that value. *Riley v. Horne*, 5 Bing. 217. Mere concealment of value, however, is not enough to disentitle the owner to recover in case of loss. *Heal v. Fagg*, 5 B. & Adol. 342.

The carrier is responsible for loss occasioned the owner by unreasonable delay in the performance of the journey, or delivery of the goods to the consignee. In the absence of a special contract with respect to the time of delivering the goods, the carrier is bound to perform his duty; that is, to deliver the goods at their destination in a reasonable time, according to the usual course of business with all convenient despatch. Story's Bail. s. 529. *Briddon v. G. N. Rail. Co.* 28 L. J. Ex. 51; *see* 27 id. 417. If he enter into a contract to deliver within a particular time, he will be liable in case of a breach of the contract by a delay beyond the stipulated period. There is this distinction, however, between the responsibility for the loss of or damage to the goods themselves, and damage sustained by a delay in the delivery; that in the former case, the responsibility arises out of a liability similar to that of an insurer, while in the latter, the carrier is responsible if he has been guilty of negligence, or by reason of a breach of duty. *See* id. s. 545.

[1] The carrier must take care that the goods are delivered to the right person, or otherwise he will be responsible. *Garnett v. Willan*, 5 B. & A. 58. Where the consignee or owner of the goods neglects to take them away within a reasonable time, and they remain in the custody of the company, a minor degree of responsibility attaches. Until the expiration of such reasonable time, the goods are in their custody in the character of carriers, and they are responsible as such. *Forward v. Pittard*, 1 T. R. 27. *Hyde v. Trent Navigation Co.* 5 id. 389. After the expiration of the reasonable time, they hold the goods as ordinary bailees or depositaries, and are liable only for loss occasioned by the negligence of themselves or their servants. *Garside v. Trent and Mersey Navigation Co.* 4 id. 581. *Thomas v. Boston & Providence Railroad Co.* 10 Metc. Rep. 472, Am. The responsibility in case of delivery of the goods to a person not entitled to them by the innocent mistake of their servants still continues, notwithstanding they may have so warehoused the goods for the accommodation of the owner. *See* Story, Bail. s. 450. While the goods are in the possession of the carrier he is bound to take proper means for their preservation, and it was even held to be within the scope of a railway company, employed to carry quicks, to plant them, or allow them to be planted in their own land for that purpose. *Taff Vale Railway Co. v. Giles*, 2 E. & B. 823; 1 Sm. L. C. 182, 3d ed.

The direction of the goods may at any time before delivery be countermanded by the consignor, and the carrier be required to abstain from delivering them, as frequently happens where the vendor stops goods *in transitu*, the price of which the purchaser has failed to pay, and this countermand of direction the carrier is bound to obey. *See* Story's Bail. s. 581. *See* Stoppage *in transitu*.

The carrier is justified, whether there has been a countermand of direction or not, in delivering the goods to a person other than the consignor or consignee, if such person be the true owner, and is entitled to the possession of the goods, and has required that they should be delivered up to him, or they may under such circumstances justify retaining them by his order and on his behalf. *Thorne v. Tilbury*, 3 H. & N. 534. *Sheridan v. New Quay Co.* 28 L. J. C. P. 58. Where the adverse title is made known to the carrier, and if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods. *Taylor v. Plumer*, 3 M. & S. 562. *Wilson v. Anderton*, 1 B. & Adol. 450.

Where goods are refused by the consignee, the carrier is bound to exercise a reasonable degree of care and foresight in protection of the rights of the owner. There is no rule of law that the carrier must give notice of the refusal to the consignor. Although there are many cases in which it would be proper for him to do so, yet, under particular circumstances, there might be no negligence in abstaining from giving such notice. *Hudson v. Baxendale*, 2 H. & N. 575. In *Crouch v. the Great-Western Railway Co.* id. 491; in error, 3 id.; the question was raised with respect to the conduct of a railway company with reference to a parcel received by them in London for carriage to Plymouth. The parcel was tendered to the consignee, who refused to receive it, on the ground that the charge for its carriage was excessive. On the following day he made application at the office of the railway for it, tendering the sum demanded, but he was informed that it had been sent back to London:—The court held, that this proceeding on the part of the company amounted to a breach of that duty of pursuing a reasonable line of conduct with reference to the circumstances upon the parcel being declined. *Channell, B.*, delivering the judgment of the court, thus expressed himself:—"It was open to the defendants either to deliver the parcel and afterwards sue for the carriage, or to detain the parcel in respect of their lien for the carriage. They must be taken to have elected to retain the parcel for their lien, and to have done so as carriers. Even supposing that in strictness the duty of the defendants as carriers

II. The Carriers' Act.[1]

(A) *Protects Carriers against Liability for Loss of certain Goods above the Value of* 10*l.*, *unless Value declared.*

The 11 Geo. 4 and 1 Wm. 4, c. 68, "An Act for the more effectual Protection of Mail Contractors, Stage-coach Proprietors, and other Common Carriers for Hire against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof," recites that, "whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depreciation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased: And whereas, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers with the intent to limit such responsibility, they had become exposed to great and unavoidable risks, and have thereby sustained heavy losses; enacts, That from and after the passing of this act no mail contractors, stage-coach proprietors, or other

Mail contractors, coach proprietors,

ended with the tender of the parcel on the 28th, and the refusal of the consignee then to accept it and pay for the carriage, it cannot, we think, be doubted that the defendants had another duty to perform, and that it was their duty to take care of the goods of the consignor, who in this case was the plaintiff, and that this duty was one springing out of their original employment as carriers. This duty, we think, called upon the defendants to retain the parcel at Plymouth, its place of destination, at least for a reasonable time, and during that time to await any direction from, if not to communicate with, the consignor. The defendants did not do so; and it seems to us that sending the parcel to London at the time they did, followed by the non-delivery of the parcel to the plaintiff, upon or subsequently to the several applications made for it, afford sufficient evidence of breach of duty by the defendants, in not taking care of the parcel for the plaintiff, even supposing their duty *qua* carriers ended with the tender of the goods on the 28th."

[1] The rule of the common law being exceedingly stringent on the carrier in the exaction of very great care and the imposition of great responsibility, carriers found it their interest to make agreements requiring a premium in proportion to the risk incurred, where the goods intrusted to them were beyond a certain value. This was generally done by inserting in the newspapers, distributing in handbills, and sticking up in their office, a notice that they would not be accountable for any property beyond a certain value, unless insured and paid for at the time of delivery. If this notice were brought home to the knowledge of the employer (for that was indispensably necessary in order to render it available): *Kerr v. Willan*, 6 M. & S. 150. *Palmer v. Grand Junction Railway Co.* 4 Mee. & W. 749. *Walker v. Jackson*, 10 id. 161), his consent to the terms was implied (*Mayhew v. Eames*, 3 B. & C. 601. *Rowley v. Horne*, 3 Bing. 2); and the carrier become entitled to the protection for which he stipulated. *Nicholson v. Willan*, 5 East, 507. But these notices, as generally worded and interpreted by courts of law, only exonerated the carrier from liability for loss or damage occurring to uninsured goods, *without fault on his part;* for if he were guilty of wilful misconduct, or gross negligence, he was chargeable with the damage occasioned thereby, and his notice was not permitted to limit his responsibility (*Smith v. Horne*, 2 Moore, 18. *Duff v. Budd*, 3 B. & B. 177; 8 Taunt. 144; Holt, N. P. C. 643. *Birkett v. Willan*, 2 B. & A. 356. *Garnett v. Willan*, 5 id. 53. *Sleat v. Fagg*, 5 id. 342. *Wright v. Snell*, 5 id. 350. *See* the judgment of *Bayley, B.*, in *Owen v. Burnett*, 4 Tyr. 143; 2 C. & M. 353; and see *Bodenham v. Bennett*, 4 Price, 31), unless the employer had been guilty of a wilful concealment of the nature and value of the property (*Batson v. Donovan*, 4 B. & A. 21. *Miles v. Cattle*, 6 Bing. 743. *See* the comments of *Lord Mansfield, C. J.*, on *Kenrig v. Eggleston*, Aleyn, 93; and the case cited by Hale, 1 Vent. 238, contained in *Gibbon v. Paynton*, 4 Burr. 2301; Bull. N. P. 71); for that would have discharged the carrier, even though he had given no notice.

The construction of these notices, and the necessity of proving that they had arrived at the employer's knowledge, giving rise to much litigation, the legislature has enacted positive regulations on the subject by the 11 Geo. 4, and 1 Wm. 4, c. 68 (*supra*, in text).

and carriers not to be liable for loss of certain goods above the value of 10*l.* unless delivered as such and increased charge accepted.

common carriers by land for hire shall be liable[1] for the loss of or any injury to any article or articles or property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets,[2] bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass,[3] china, silks in a manufactured[4] or unmanufactured state, and whether wrought up or not wrought up with other materials, furs[5] or lace, or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant,[6] for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property aforesaid shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

(B) *An Increased Rate of Charge may be demanded, but Notice*[7] *of the same must be affixed in Office.*[8]

Where parcel so delivered, increased rate

By sect. 2, "when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as

[1] Notwithstanding this act, it was considered that the carrier was still liable for *gross negligence*, although he might have affixed in his office such a notice as the act requires, and although the articles lost by his misconduct might be of such a description as to require a declaration of value and payment of increased charges, which their owner had, however, neglected to make in respect of them. In determining what should be such negligence, the cases previous to the act were supposed to be still authorities (*see* the judgment in the case of *Owen v. Burnett*, 4 Tyr. 142; 2 C. & M. 353; and see *Wild v. Pickford*, 8 Mee. & W. 443); for the protection given to the carrier by the act in respect of the articles there named, was thought to be substituted for the protection which he formerly derived from his own notice. This doctrine, however, has been overruled; and it is now decided that the carrier is not, under such circumstances, liable for a loss of the articles named in the statute, occasioned by the gross negligence of his servants, not amounting to a misfeasance. *Hinton v. Dibbin*, 2 Q. B. 646.

[2] A gold chain used for an eye-glass was held not to be a trinket. *Davey v. Mason*, Car. & M. 45: *sed qu. Bernstein v. Baxendale*, 28 L. J. C. P. 265, where ivory bracelets, shirt-pins, port-monnaies, &c., were held to be within the clause.

[3] Mirrors or looking-glasses are within the terms. *Owen v. Burnett*, 2 Mee. and W. 353; 3 L. J. Ex. 76.

[4] As silk guards. *Bernstein v. Baxendale*, *supra*.

[5] Not hats made from fur of rabbits. *Mayhew v. Nelson*, 6 C. & P. 58.

[6] Railway companies make a frequent practice of sending round their vans to collect goods. A statement of the nature and value to the carrier is, it seems, in these cases a sufficient declaration thereof to satisfy the act. The company has been held responsible under these circumstances for injury to a valuable picture, notwithstanding the carriage charged and paid was the lower charge, not including insurance, no more having been demanded by the company. *Behrens v. the Great Northern Railway Co.* 30 L. J. Ex. 153.

[7] The form of notice almost universally adopted is given in the notes to *Owen v. Burnett*, 4 Tyr. 134, n. a.

[8] By the 5th section of the Carriers' Act it is enacted, "that for the purposes of this act every office, warehouse, or receiving-house which shall be used or appointed by any mail contractor or stage-coach proprietor, or other such common carrier as aforesaid, for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving-house, warehouse, or office of such mail contractor, stage-coach proprietor, or other common carrier." See *Symes v. Chaplin*, 5 Ad. & E. 634.

aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage-coach proprietors, and common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving-house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge."

Increased rate of charge may be demanded.

Notice of the same to be affixed in offices or warehouses.

(C) *Carrier must give Receipt if required.*

(D) *In case of Neglect to give Receipt or affix Notice, the Carrier is not entitled to the Benefit of the Act.*

By sect. 3, "provided always, that when the value shall have been so declared and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp-duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage-coach proprietor, or other common carrier as aforesaid, shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at common law, and be liable to refund the increased rate of charge."

Carriers to give receipts acknowledging increased rate.

In case of neglect to give receipt or affix notice, the carrier not to be entitled to benefit of this act.

(E) *Publication of Notices is declared by the Act not to Limit the Liability of Carriers in respect of any other Goods conveyed.*

By sect. 4, "provided always, that from and after the first day of September now next ensuing, no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them, but that all and every such mail contractors, stage-coach proprietors, and other common carriers as aforesaid shall, from and after the first day of September, be liable as at the common law to answer for the loss or any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made or given contrary thereto, or in anywise limiting such liability, notwithstanding."

Publication of notices not to limit the liability of proprietors, &c. in respect of any other goods conveyed.

(F) *But the Act does not affect Contracts.*

By sect. 6, "provided always, that nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier and any other parties for the conveyance of goods and merchandises."

Not to affect contracts.

(G) *The Increased Charge may be Recovered back in case the Parcel is Lost.*

By sect. 7, "provided also, that where any parcel or package shall have been delivered at any such office and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package."

Parties entitled to damages for loss may also recover extra charges.

(H) *The Act does not Protect the Carrier against Loss by the felonious Act of his Servants.*

Nothing herein to protect felonious acts.

By sect. 8, "provided also, that nothing in this act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ,[1] nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct."

(I) *The Carrier is not concluded by the declared Value of the Parcel.*

Coach proprietors and carriers liable only to such damages as are proved.

By sect. 9, "provided also, that such mail contractors, stage-coach proprietors, or other common carriers for hire, shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require from the party suing in respect of any loss or injury proofs of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage-coach proprietors, or other common carriers as aforesaid, shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned."

(J) *The Act does not protect the Carrier against Liability to answer for Damages sustained by Default in not Delivering.*[2]

(K) *Effect of Act.*[3]

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[1] The words of the statute receive a liberal construction. They must be taken to mean book-keepers, porters, or other servants, actually employed to do what the carrier has undertaken to do. They apply to the servants of another company or carrier by whom the goods are forwarded by a carrier who has contracted for the carriage beyond the place to which he has the means of himself transporting them. And as the carrier would not be protected if they were stolen by himself, neither would he if a person whom he employs as a substitute were to steal them. *Maclin v. London and South-Western Railway Co.* 2 Ex. 215: *per Rolfe, B.* Accordingly, where a parcel was stolen by a servant of Chaplin and Horne, who carried goods from a terminus of a railway to the places in the neighbourhood to which they were directed, under an arrangement with the company, it was held that the servant when so employed was a servant of the railway company, so as to make a theft by him a theft by their servant. *Maclin v. The London and South-Western Railway Co. supra.*

[2] The loss or injury against which the statute of 11 Geo. 4, and 1 Wm. 4, c. 68, s. 1, protects the carrier in case articles of the character enumerated are delivered to him without a declaration of their value, *is a loss of the article itself*, such as the abstraction of it by a stranger, or by the carrier's own servant, not amounting to a felonious act, or by the carrier or his servant losing it from a vehicle while in the course of carriage, or by mislaying it, so that it was not known where to find it when it ought to be delivered, or other causes not very easy to define, falling under the description of loss by carrier; but it does not protect the carrier against loss occasioned to the owner by the non-delivery, or by delay in the delivery of those articles, by the neglect of the carriers or their servants. In ordinary parlance, the words of the statute mean, loss by the carrier of articles committed to him, or any "injury" to them whilst in his care; not the loss sustained by the owners by non-delivery of the article in due time or altogether, or the loss of the article by him. By the term injury is ordinarily understood injury to the article itself. The first section recites that valuable property and articles of great value and small compass were liable to depredation, and the reason of the law must be considered as being to protect the carrier, not in all cases where the owner of the article suffers or sustains damage from the neglect of the carrier to carry, but in cases of a similar nature to those recited, where the chattel is either abstracted or otherwise lost from the personal care or from the place where it ought to be, and by reason of such loss is incapable of being delivered at the time it ought to be: the carrier is wholly exempted from being responsible for a loss by him of the particular article named if there should be such a loss. *Hearn v. London and South-Western Railway Co.* 10 Ex. 793; 24 L. J. Ex. 180: *per Parke, B.*

[3] The following is the effect of the act. It exempts the carrier from his common-law responsibility as to the goods enume-

III. Actions by and against Carriers.

(A) *Who must Sue in case of Loss of Goods.*[1]

(B) *In Actions against Carriers.*[2]

(C) *Who must be Sued where Parcel to be carried beyond the Point to which the Carrier's means of Conveyance extends.*[3]

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rated only in the event of his affixing a public and conspicuous notice in his receiving-office, notifying the extra charge for carrying such valuable articles, unless there is a special contract. If such notice be so affixed, the carrier is not responsible for the loss of any goods of the description mentioned, even although it be not seen by the consignee or owner, unless the value and nature of the goods be declared, and the increased rate of charge for carriage be paid to, or an agreement to pay it be accepted by the carrier, or unless the loss be occasioned by the felonious act of some servant in his employ. And on this head of the case it has been held, first, that to entitle a party to recover for the loss of, or for any injury to such articles, he must give express notice to the carrier of the value and nature thereof (*Owen v. Burnett*, 2 C. & M. 353. And see *Buss v. Pink*, 6 Car. & P. 261, *ante*, 36, n.); and, secondly, that in cases within the act, if the value of the goods be not declared, and the sender do not pay or engage to pay the increased charge, the carrier is not liable for their loss, although it happened by the gross negligence of his servants; at all events, unless such negligence amounted to a misfeasance. *Hinton v. Dibdin*, 2 Q. B. 646, overruling, on this point, *Owen v. Burnett*, *supra*. If, however, the carrier refused, on demand, to give a receipt for the goods and extra charge, this will deprive him of the protection of the act (s. 3). Thirdly, if the nature of the goods and their value be declared by the sender, and the carrier makes no demand of extra charge, but the ordinary charge only is afterwards received from the consignee, the carrier will, notwithstanding, be responsible. *Behrens v. The Great Northern Railway Co.* 30 L. J. Ex. 153. Lastly, as to all goods not specifically mentioned in the act, and as to goods of the description therein mentioned, when the value is not above 10*l.*, the carrier's common-law liability remains, even although such notice be given, or any public notice or declaration be made or given by the carrier, with the intention of limiting his liability with reference thereto.

[1] Generally speaking, when goods are forwarded in pursuance of an order which binds the persons giving it to receive the goods, as the property in them passes to that person by delivery of the carrier, he is the proper plaintiff if they should be lost (*Dawes v. Peek*, 8 T. R. 330. *Dutton v. Solomonson*, 3 B. & P. 582), for the vendor was his agent to employ the carrier. But it is otherwise when the property in the goods has not yet passed to the vendee, as where there is no writing sufficient to satisfy the Statute of Frauds, and the carrier was not of his selection (*Coombs v. Bristol and Exeter Railway Co.* 3 H. & N. 510; 27 L. J. Ex. 401. *Coats v. Chaplin*, 2 Q. B. 483. *See* also *Norman v. Phillips*, 14 Mee. & W. 277); or where the goods are sent merely for approval (*Swain v. Shepherd*, 1 M. & Rob. 224); or the consignee is the agent of the consignor (*Sargent v. Morris*, 3 B. & A. 277); or the carrier has contracted to be liable to the consignor in consideration of the latter becoming responsible for the price of the carriage. *Moore v. Wilson*, 1 T. R. 659. *Davis v. James*, 5 Burr. 2680.

[2] By the Carriers' Act (11 Geo. 4 and 1 Wm. 4, c. 68, s. 5), any one or more such mail contractors, stage-coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only, and no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or copartner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid.

[3] The question has frequently arisen, particularly with reference to railway companies, whether it was necessary to sue the carrier or company who received a parcel for conveyance beyond the limits to which his or their means of conveyance extended, or the carrier in whose hands it was actually lost, where the loss occurred while being conveyed beyond the limits of the first-mentioned carrier. It is now well settled that where a railway company receive at one charge goods for transport beyond the limits of their line, they undertake, in the absence of any notice or stipulation to the contrary, for their safe carriage the entire distance, and are responsible as common carriers during the whole of the journey. This consequence ensues whether the carriage be or be not prepaid (*Muschamp v. Lancaster and Preston Junction Railway Co.* 8 Mee. & W. 421); or whether the goods, after being carried some distance on the company's railway, are transported for the remainder of the journey on the line of another company or companies (*Collins v. Bristol and Exeter Railway Co.* 11 Ex. 790); or are forwarded by coach or canal, or even across a branch of the sea (*Wilby v. West Cornwall Railway Co.* 2 H. & N. 703), where, *per Pollock, C. B.*, "The question is the same, whether there is a continuous railway for the whole distance, or whether there is a short railway, then a carriage by van, then a carriage by water, then again the railway. Suppose a parcel is brought to a railway station in London, directed to a person at

(D) *Form of Declaration.*[1]
(E) *Pleas.*[2]
(F) Onus Probandi.[3]
(G) *Damages.*[4]

Brighton, and it is accepted for the purpose of delivery, it is a question for the jury whether that was not done with the intention of carrying it the whole distance."

[1] The ordinary form of declaration in an action against carriers is as follows :—

For Delay in Carrying.

That the defendants, being common carriers of goods for hire, the plaintiff caused to be delivered to them as such common carriers, and they as such received certain goods, that is to say [*describe them*], of the plaintiff, to be carried by them for the plaintiff from to and there to be delivered by them to the plaintiff, for reward to them in that behalf. That the defendants, whilst they so had the goods for the purpose aforesaid, did not take due and proper care of the same, but wholly neglected to do so, and so carelessly, negligently, and improperly carried the same, and took such bad care thereof, that by and through the default of the defendants the goods were lost to the plaintiff for a long space of time, to wit, from to and were also greatly damaged and deteriorated in value [*if any special damage is claimed it must be stated*]. See other form, B. & L. 74.

If the goods were carried by a railway company or other carrier under a special contract, care must be taken to declare on such special contract. For if the plaintiff declare against the carrier, stating merely a breach of duty as common carrier, and it should appear at the trial that the goods were carried under a special contract, which in the case of a railway company complied with the statute in being reasonable and signed, the defendant, under a traverse of the bailment, will be entitled to judgment. *Peek v. North Staffordshire Railway Co.* 29 L. J. Q. B. 97. *See* also *Walker v. York and North Midland Railway Co.* 2 E. & B. 750. *White v. Great Western Railway Co.* 2 C. B. (N. S.) 7. *Simons v. G. W. R. Co.* 2 id. 620.

[2] Under "not guilty" carriers cannot show loss by plaintiff's own negligence. *Webb v. Page*, 6 Man. & G. 196. *See* form, B. & L. 320. By sect. 10 of 11 Geo. 4 and 1 Wm. 4, c. 68, it is enacted, that "in all actions to be brought against any such mail contractor, stage-coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or the defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action."

[3] In all cases of loss, it seems that the *onus probandi* is on the carrier to exempt himself from liability, for, *primâ facie*, the law imposes the obligation of safety upon him. It will not, therefore, be sufficient *primâ facie* evidence of loss by negligence that the goods have been delivered to the consignee. *Gilbert v. Dale*, 5 Ad. & E. 540; 1 Nev. & P. 22; Story, Bail. 529.

[4] In actions against carriers for the loss of goods, the damages are in general confined to the actual value of the goods. The value is not according to what may be the *pretio affectionis* of the owner. In the case of merchandise, it may be ascertained by taking what the goods cost, and adding to that what the owner has expended upon them in warehousing, packing, &c. (*Ewbank v. Nutting*, 7 C. B. 797), or, more correctly, by referring to the market price. It has been held, in the case of shipments abroad, that if the goods were being conveyed to a foreign market, the jury might give their value at such market at the time they ought to have been delivered there as the measure of damages. *Brandt v. Bowlby*, 2 B. & Adol. 932.

In case of delay in the carriage of goods, if the goods have been deteriorated by an unreasonable delay, consequent on the culpable negligence of the carrier, he will, unless protected by a special contract (*Beal v. South-Devon Rail.* 29 L. J. Ex. 441), be bound to compensate the owner to the extent of the deterioration caused by such delay.

If the goods were being sent to a market, and by reason of such culpable negligence they arrive at the place of destination too late for the market, the carrier will, if he had notice, either by being informed thereof or from the apparent nature of the goods, from their destination, or from previous course of dealings, be bound to recompense the owner the reasonable loss which has immediately flowed from his being disappointed of the market. In some instances this may be less than the actual loss sustained; for if the owner, by supineness or by neglecting to take the precautions which a reasonably vigilant person would, has increased the loss beyond what it otherwise would have been, the carrier will not be under any obligation to reimburse him for a loss which accrued in truth from his own neglect, and not necessarily from their default. See *Black v. Baxendale*, 1 Ex. 410. *Hamlin v. G. N. Rail. Co.* 26 L J. Ex. 420.

As to the loss of profits, the owner is not entitled to such damages, unless the carrier had notice of the nature of the goods, and therefore of the extraordinary consequences resulting from a temporary or entire deprivation of the use. Thus, where a mill-owner sent the broken shaft of his mill by a common carrier to the engineers to serve as a

IV. Of the Obligations Imposed by the Railway and Canal Traffic Act, 1854.[1]

(A) *Railway and Canal Companies must make Arrangements for receiving and forwarding Traffic without unreasonable Delay and without Partiality.*[2]

Duty of railway companies to make arrangements for receiving and forwarding traffic without unreasonable delay and without partiality.

By the 17 & 18 Vic. c. 31, "An Act for the better Regulation of the Traffic on Railways and Canals," it is enacted, sect. 2, "every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles,[3] and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,[4]

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model for a new shaft, there was a delay of several days in carrying the shaft, and he claimed to recover as damages against the carrier the profits he had lost by reason of the mill being stopped for several days longer than was necessary, the shaft being indispensable for working the entire machinery. But the Court held, that in the absence of any notice of the peculiar circumstances, such head of damage was too remote. "The loss of profits," said *Mr. Baron Alderson*, "cannot reasonably be considered such a consequence of the breach of contract as would have been fairly and reasonably contemplated by both the parties when they made this contract, for such loss would neither have followed naturally from the breach of such contract in the great multiplicity of cases accruing under ordinary circumstances, nor were the special circumstances which perhaps would have made it a natural and reasonable consequence of such breach of contract communicated to or known by the defendants." *Hadley v. Baxendale*, 9 Ex. 341. So the loss of the chance of a model gaining a prize in a competition is, it seems, too remote to be considered in an action against a railway company for its loss while being conveyed to the competition. *Watson v. Ambergate Railway Co.* 15 Jur. 448. The loss, however, sustained by a depreciation in the market value of an article of commerce is not regarded as a loss of profits, but is to be considered as an intrinsic depreciation of the article itself, and if referable to the carrier's delay, it is a loss for which he is responsible. *Wilson v. the Lancashire and Yorkshire Railway Co.* 9 W. R. Ex. 635. *See* also *Collard v. South-Eastern Railway Co.* id. 697.

Further, expenses reasonably and necessarily incurred by the owner in consequence of the delivery of goods being so delayed for an unreasonable time, may be recovered against the carrier. *Black v. Baxendale*, 1 Ex. 410.

[1] This act may be cited for all purposes as "The Railway and Canal Traffic Act, 1854."

[2] *Meaning of Board of Trade.*—By s. 1 of the act, the interpretation clause, it is enacted, that in the construction of this act "the Board of Trade" shall mean the lords of the committee of her Majesty's privy council for trade and foreign plantations.

Traffic.—The word "traffic" shall include not only passengers and their luggage, and goods and other things conveyed by any railway company, or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company.

Railway—Canal.—The word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic; and the word "canal" shall include any navigation whereon tolls are levied by authority of parliament, and also the wharves, and landing-places of and belonging to such canal or navigation, and used for the purpose of public traffic.

Railway Company, &c.—The expression "railway company," "canal company," or "railway and canal company," shall include any person being the owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any act of parliament.

Stations.—A station, terminus, or wharf, shall be deemed to mean another station, terminus, or wharf, when the distance between such stations, termini, or wharves shall not exceed one mile, such stations not being situate within five miles of St. Paul's church in London.

[3] See *Barrett v. Great Northern and Midland Railway Comps.* 1 C. B. (N. S.) 423.

[4] *With respect to what constitutes an undue preference.*—The mere circumstance that there is an inequality in the charge does not necessarily show that there is an *undue preference*. "Where the purpose and effect of the thing complained of is the benefit of the company in their character of proprietors of a particular railway, the court might feel greater reluctance to interpose, partly from an un-

and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, and which have

willingness to interfere with the parties in the management of their own affairs for their own advantage, partly from a disposition to give companies credit for acting on an enlightened view of their own interests as identified with those of the public, yet, if the court became clearly satisfied that the company were seeking to promote its own advantage by establishing an inequality which was unreasonable under the circumstances, and operated unfairly and injuriously on particular individuals, or that it was affording to one person or set of persons an advantage which it would not afford to another under similar circumstances, this court would not hesitate to interfere to prevent such a result, although by so doing they might prevent the company from securing all the profit that it might otherwise derive from the use of its property. Thus, were a complaint made that a railway company, as between two intermediate stations, charged a higher rate than was due to the intermediate space in proportion to the charge made on the entire line of railway, this court, if it were made to appear that the disproportion was not justified by the circumstances of the traffic, in other words, was an undue prejudice or unreasonable disadvantage to those using the part of the railway in question, would interfere to set aside such arrangement. So, again, if an arrangement were made by a railway company, whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favourable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantage were extended to all persons under the like circumstances, yet it would assuredly insist on the latter condition, and would interfere in the case of any special agreement by which the company had secured to a particular individual the benefit of such an agreement to the exclusion of others, or even where an attempt had been made, by keeping the agreement secret, to make it operate unduly to the prejudice of third parties." *Per Crowder, J., in Nicholson v. the Great Western Railway Co.* 28 L. J. C. P. 89. *See* also *Ransome v. the Eastern Counties Railway Co.* 1 C. B. (N. S.) 43; 26 L. J. C. P. 91.

The interest of the company, therefore, as proprietors of the line, may be taken into consideration in determining what is an undue preference; but where the difference of charge is in favour of goods carried along the line and also on a *distinct* line, the property of the company, or beyond the terminus, that will be regarded as an undue prejudice to goods carried merely on their line alone. "The company," said *Mr. Justice Crowder*, "must in such a case be taken to be, *quoad* the particular railway, in the position of third parties, and that they cannot, with a view to such separate interests, give an undue preference, or impose an unreasonable disadvantage, any more than they could do so to promote the interests of any other party. Thus, if a railway company, being proprietors of one line from A. to B. and of another line from C. to D., were, in order to obtain the custom of a particular individual on the first of those lines, on which they might be subject to competition from a rival line, to agree to convey his goods on the line from C. to D. at a cheaper rate than those of another person using only the latter line; or, if a railway company carrying on, in addition to its business as carriers on the line, that of carriers to and from the termini of the railway, were, with a view to obtain additional custom in the latter, to carry on the railway for those who employed them as carriers to and from the railway at a lower rate than for those who did not; in both these cases we should have no difficulty in holding that the company must be considered, as regards those separate interests, in the light of third parties, and that they cannot promote those interests at the expense of the right of the public to that equality on the particular railway which it was the intention of the act of parliament to secure." *Nicholson v. the Great Western Railway Co.* 28 L. J. C. P. 89.

The court will interpose if there is a difference of charge in favour of a particular individual to carry his goods at a lower rate than those charged to other persons, in case there is nothing in the nature of the traffic itself to justify such a difference (*Ransome v. Eastern Counties Railway Co.* 1 C. B. N. S. 43; 26 L. J. C. P. 91. *Oxlade v. the North-Eastern Railway Co.* 26 L. J. C. P. 134; 1 C. B. N. S. 673); as, where the difference of charge consisted in the imposition of a higher rate upon packages known as packed parcels—that is, which consisted of one package directed to one consignee, containing a number of parcels for different persons, it was held that there was no such difference in the trouble or risk of carriage as authorised any extra charge beyond that demanded for ordinary packages. *Garton v. Bristol and Exeter Railway Co.* 4 H. & N. 33. *Crouch v. the Great Northern Railway Co.* 11 id. 742.

But the obligation imposed by the statute is not contravened by the company carrying at a lower rate in consideration of a guarantee of large quantities and full van-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee.

the terminus, station, or wharf of the one near the station or terminus or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid,[1] and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times offered to the public in that behalf."

(B) *Complaint that reasonable Facilities for forwarding Traffic, &c. are not afforded, may be made to Court of Common Pleas.*

Parties complaining that reasonable facilities for forwarding traffic, &c. are withheld, may apply by motion or summons to the superior courts.

By sect. 3, "it shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this act, to apply in a summary way by motion or summons in England to her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's superior courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court; and upon the certificate to her Majesty's Attorney-general in England or Ireland, or her Majesty's Lord Advocate in Scotland, of the Board of Trade alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said Attorney-general or Lord Advocate to apply in like manner to any such court or judge to hear and determine the matter of such complaint;[2] and for that purpose, if

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Nicholson v. the Great Western Railway Co. 28 L. J. C. P. 89. But if the advantage offered to a particular customer is in consideration of his undertaking to supply goods for carriage on other lines of the company, that is an undue preference. *Baxendale v. the Great Western Railway Co.* 28 L. J. C. P. 69.

Where the company carry goods between remote stations upon a lower scale than between stations which are nearer, there must be a reasonable proportion between the two charges with reference to the profitable working of the line, and such scale must not be adopted with a view to encourage the traffic from the more remote place at the expense of that which is nearer, otherwise it will constitute an undue preference of the remote place within the prohibition of the statute. *Ransome v. Eastern Counties Railway Co.* 27 L. J. C. P. 166.

On the same ground that an identity of charge for goods carried from a remote point and from one nearer is, in the absence of exceptional circumstances, an undue disadvantage to the latter, an identity of charge for goods collected by the company and brought by them to the station, and goods delivered to them there for carriage, is an undue advantage to the former. *Baxendale v. Great Western Railway Co.* 28 L. J. C. P. 81. *Garton v. Great Western Railway Co.* 28 L. J. C. P. 158. See *Pickford v. Grand Junction Railway Co.* 10 Mee. & W. 399.

[1] The intent of the statute imposing this duty is, that railway companies should so conduct their traffic that no undue preference should be given to, and no undue prejudice imposed upon, any traveller, person, or company using the line, from the same point of departure to the same point of arrival. In accordance with this construction the Court of Common Pleas refused an injunction on the complaint of a company, having a branch on a trunk line, to restrain the trunk company from charging higher rates for the conveyance of passengers to the complainant's terminus than they charged for the conveyance of passengers to the terminus of another branch line (in which they themselves were interested), extending over the same number of miles. *In re the Caterham Railway Co. v. The London, Brighton, and South-Coast Railway Co.* 1 C. B. (N. S.) 410.

[2] By rule 1 of the rules framed by the Court of Common Pleas (January 31st, 1855) for regulating these proceedings, it is ordered, that "every application made under this act to the court shall be for a rule calling upon the company or companies complained of to show cause why a writ of injunction should not issue against such company or companies, enjoining them to do, or desist from doing, the thing required to be done, or the thing the doing of which is complained of by the company or person making such application; and every application made under this act, to a judge at chambers, shall be by summons calling upon the company or companies complained of to show cause in like manner, which summons shall be granted only on affidavit, and upon a statement made to the judge, in like manner as upon an application to the court for a rule to show cause."

the court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint;[1] and if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made in violation or contravention of this act by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoining obedience to the same;[2] and in case of disobedience of any such writ of injunction or interdict it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day after a day to be named in the order that such company or companies shall fail to obey such injunction or interdict; and such monies shall be payable as the court or judge may direct, either to the party complaining or into court to abide the ultimate decision of the court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judg-

[1] By rule 2 of the above rules it is ordered, that "if on the hearing of any such rule or summons, the court or judge shall think fit to arrest and prosecute inquiries into the matter thereof, under the 3d section of this act, the order for that purpose shall be in the following terms, or to the like effect, the rule or summons being enlarged until such further day as the court or judge shall think fit, in order that, in the meantime, such inquiries may be made and reported on:—

"'*In the Common Pleas.*—In the matter of the complaint of A. B. [*or* of the company], against the company, it is ordered, that C. D., Esquire, engineer [*or as the case may be*], do forthwith make such inquiries into the matter of this complaint as may be necessary to enable the court [*or* the Honourable Mr. Justice] to determine the same, and to report thereon to the court [*or* to the said Mr. Justice], on or before the day of next.

"'Dated this day of 186 .'"

By rule 3, "office copies of all the affidavits filed by either party on the hearing of such rule or summons shall, at the expense of such party, be furnished to the person appointed to make such inquiries, within three days after the making of such order as aforesaid."

[2] By rule 5, "every writ of injunction issued under this Act shall be in the following form, or to the like effect:—

"'Victoria, &c. To the company, their agents, and servants, and every of them, greeting.

"'Whereas A. B. [*or* the company], hath lately complained before us in our Court of Common Pleas at Westminster, of a violation and contravention by you, the said company, of the Railway and Canal Traffic Act, 1854, that is to say, in [*state the act or omission complained of*]. And whereas, upon the hearing of such complaint, the same hath been found to be true. We do therefore strictly enjoin and command you, the said company, and your agents and servants, and every one of you, that you, and every one of you, do from henceforth and altogether absolutely desist from [*state the matter for the injunction where an act done is complained of*], *or* that you and and every one of you forthwith do [*state the matter for the injunction where an omission is complained of*], until our said court shall make order to the contrary.

"'Witness, Sir William Erle, knight, at Westminster, the day of in the year of our Lord '"

By rule 6, "if the court or a judge shall think fit also to make an order directing a payment of a sum of money by the company or companies complained of, such order shall be in the following form, or to the like effect:—

"'*In the Common Pleas.*—In the matter of the complaint of against the company, it is ordered that the said company do pay to the said [*or* 'into court to abide the ultimate decision of the court, in the matter of the said complaint,' *or* 'to the use of her Majesty'] the sum of £ for every day after the day of instant that the said company shall fail to obey a certain writ of injunction, dated this day, and issued against the said company, at the instance of the said

"Dated this day of 186 .'"

ment in any superior court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the Court of Session;[1] and in any such proceeding as aforesaid such court or judge may order and determine that all or any costs thereof or thereon incurred shall and may be paid by or to the one party or the other as such court or judge shall think fit; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such court or judge, to receive evidence on oath relating to the matter of any such inquiry and to administer such oath."

(C) *Rules may be framed to regulate Proceedings.*[2]

Judges may make such regulations as may be necessary for proceedings under this Act.

By sect. 4, "it shall be lawful for the said Court of Common Pleas at Westminster, or any three of the judges thereof, of whom the Chief Justice shall be one, and it shall be lawful for the said courts in Dublin, or any nine of the judges thereof, of whom the Lord Chancellor, the Master of the Rolls, the Lord Chief Justice of the Queen's Bench and Common Pleas, and the Lord Chief Baron of the Exchequer shall be five, from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice, and otherwise in carrying this act into execution, before such courts and judges as they may think fit, in England or Ireland; and in Scotland it shall be lawful for the Court of Session to make such acts of sederunt for the like purpose as they shall think fit."

(D) *A Rehearing may be Ordered.*

Court or judge may order a rehearing.[3]

By sect. 5, "upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid, it shall be lawful for the court or judge by whom such order was made to direct, if they think fit so to do, such motion, or application, or summons, to be reheard before such court or judge, and upon such rehearing, to rescind or vary such order."

(E) *Act does not Abolish other Remedies.*

Mode of proceeding under this act.

By sect. 6, "no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal, or railway and canal company, under the existing law."

(F) *Company is liable for Default in Carriage of Goods, notwithstanding Notice to the Contrary, infra*, s. 7.

(G) *Not liable for Cattle, &c. beyond Limited Amount, unless Value declared, infra*, s. 7.

(H) *Special Contract is not Binding, unless it is Signed and is Reasonable, infra*, s. 7.

Company to be liable for neglect or de-

By sect. 7, "every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals,[4] or to any articles,

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[1] By rule 7, "if such money be ordered to be paid into court, to abide the ultimate decision of the court, the same shall, upon the ultimate decision of the court being made, be paid out of court, either to the party complaining, or to the use of her Majesty, or to the company by which the same was paid into court, as the court or judge shall direct."

[2] Rules were promulgated pursuant to this power on 31st January, 1855. These rules are all contained in the preceding notes, and in the note which follows.

[3] And by rule 4, "the parties shall be entitled to be again heard by the court or judge upon the said report, but no fresh affidavits shall be allowed in such hearing, unless by leave of the court or a judge."

[4] It was at one time considered that horses and other cattle being a subject of carriage, which only arose upon the introduction of railways, the custom which imposes upon carriers the stringent common-law obligations could not apply to them; but the above enactment sets this question at rest. *See M'Manus v. Lancashire & Yorkshire Railway*

fault in the carriage of goods notwithstanding notice to the contrary. Company not to be liable beyond a limited amount in certain cases, unless the value declared and

goods or things, in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to receiving, forwarding, and delivery of any of the said animals, articles, goods, or things that shall be adjudged by the court or judge [1] before whom any question relating thereto shall be tried to be just and reasonable:[2] Provided always, that no greater damages shall be

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Co. 2 H. & N. 693. *M'Manus v. Lancashire & Yorkshire Railway Co.* 7 Ex. 707; 27 L. J. Ex. 201. *Pardington v. South-Wales Railway Co.* 1 H. & N. 392; 26 L. J. Ex. 105.

[1] The decision of the judge at Nisi Prius is not decisive. *Lewis v. Great Western Railway Co.* 29 L. J. Ex. 425.

[2] The *onus* of proving that a condition is reasonable lies on the company. *Harrison v. London, Brighton, & South-Coast Railway Co.* 29 L. J. Q. B. 209. The following condition in a special contract for the carriage of a horse has been held to be unreasonable; and the company to be responsible notwithstanding such contract, for injury occasioned to the horse by the defective nature of the truck in which it was placed:—"This ticket is issued, subject to the owner's undertaking all risk of conveyance, loading and unloading whatsoever, as the company will not be responsible for any injury or damage howsoever caused occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." "The sufficiency or insufficiency of the vehicles," said the court, "by which the company are to carry on their business, is a matter, generally speaking, which they, and they alone, have or ought to have the means of fully ascertaining. And it would, we think, not only be unreasonable, but mischievous, if they were to be allowed to absolve themselves from the consequences of neglecting to perform properly that which seemed naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability from the consequences of their own negligence, however gross, or misconduct however flagrant. That is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured." *M'Manus v. Lancashire & Yorkshire Railway Co.* 4 H. N. 327; 28 L. J. Ex. 353.

Where by a special contract the company stipulated that they should not be answerable for the loss of dogs exceeding 5*l.* in value, unless the value were declared, and a sum of 2½ per cent., or 6*d.* in the 1*l.*, were paid on the value in excess, whatever might be the value or the distance the animal was to be carried, the court held that the condition included loss by negligence, and was void unless the alternative was reasonable, and that the alternative was unreasonable, the payment required being out of proportion to the charge for the carriage, in the case at bar being more than treble that amount and being in effect prohibitory. *Harrison v. London, Brighton, & South-Coast Railway Co.* 29 L. J. Q. B. 209.

A condition that a particular class of goods of a fragile or perishable character shall not be carried except at the owner's risk, unless an increased rate by way of insurance, and which has relation to the value of the commodity, is paid, has been held to be reasonable. *Peek v. North Staffordshire Railway Co.* 29 L. J. Q. B. 99.

The following condition was held reasonable:—"Goods conveyed at special mileage rates must be loaded and unloaded by the owners or their agents, and the company will not be responsible for any risk of stowage, loss or damage, however caused, nor for discrepancy in the delivery as to either quantity, number, or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them, however caused." *Simons v. G. W. R. Co.* 18 C. B. 826; 26 L. J. C. P. 25.

The company may restrict their liability with reference to goods of a highly perishable nature to loss or damage occasioned by gross neglect or fraud on their part, where the condition is coupled with an option offered the sender to transmit the goods free of any such condition upon payment of a reasonable sum beyond that charged for conveyance under the condition. It was so held with reference to a contract for the conveyance of fish upon the construction of a condition (coupled with such option), exempting the company "from all liability for loss or injury arising from delay or detention of train, or from any cause other than gross neglect or fraud." *Simons v. Great Western Railway Co. supra.*

A condition professing to absolve the company from liability for the *loss* of goods insufficiently or improperly packed is unreasonable, because it is immaterial when the goods are entirely lost whether or not the packing was sufficient. *Simons v. Great Western Railway Co. supra.*

It has been said, but not decided, that a condition that "the company will not be answerable for the loss or detention of any goods untruly or incorrectly described or de-

recovered for the loss of or for any injury done to any such animals beyond the sums hereinafter mentioned; (that is to say,) for any horse fifty pounds, for any neat cattle per head fifteen pounds, for any sheep or pigs per head two pounds, unless the person sending or delivering the same to such company shall at the time of such delivery have declared them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned a reasonable percentage upon the excess of the value so declared, above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge, and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 and 1 Wm. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the persons claiming compensation for loss or injury: Provided also, that no special contract [2] between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, or goods as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage:[3] Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act 11 Geo. 4 and 1 Wm. 4, c. 68, with respect to articles of the descriptions mentioned in the said act."

extra payment made.[1]
Proof of value to be on the person claiming compensation.
No special contract to be binding unless signed.
Saving of Carriers' Act, 11 Geo. 4 & 1 Wm. 4, c. 68.

V. Obligation of Carriers with Reference to Carriage of Passengers.[4]

clared in the declaration or receiving note furnished by the company" is not unreasonable. *Lewis v. G. W. R. Co.* 29 L. J. Ex. 425.

The company may require that notice of the loss of or damage to goods should be given and made within a reasonable time after their delivery, or the time at which they ought in due course to have been delivered. It has been held that a limit of seven days was not unreasonable. *Lewis v. Great Western Railway Co. supra.*

A condition in a contract for the carriage of animals protecting the company against responsibility for loss occasioned by the fear or restiveness of the animal itself, would, it appears, be considered reasonable. *Harrison v. London, Brighton, & South-Coast Railway Co.* 29 L. J. Q. B. 209.

Where a signed ticket given on the receipt of a dog was in these terms,—"The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them: and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared:"—The court held, that according to its true construction the condition meant that if a horse or other animal, exceeding the specified value, were carried without the owner having declared the value, the company were not to be responsible, whether the loss were occasioned by their own negligence or any other cause, and that as the alternative offered was, from the exorbitant rate demanded, prohibitory, the entire condition was unreasonable and void. *Harrison v. London, Brighton, & South-Coast Railway Co. supra.*

[1] It is the duty of the carrier to demand the extra rate when the value is declared. *Behrens v. G. N. R. Co.* 30 L. J. Ex. 153.

[2] The contract to be binding must be in writing. Ordinarily the contract is printed on the receipt note, and is signed by the sender on delivery of the goods to the company. It may, however, be contained in a letter or memorandum signed by the sender or his agent, referring to and adopting special conditions of the company. *Peek v. North Staffordshire Railway Co.* 29 L. J. Q. B. 97.

[3] See *Lewis v. G. W. R. Co. supra.*

Where it was dark in the office when the goods were brought, and the clerk required the person bringing them to sign a receipt-note, which there was not sufficient light to read, not informing him of its contents, but telling him upon his expressing reluctance that it was a mere formality and of no consequence, and that it contained conditions which it was necessary should be signed to be binding, the court held that a signature obtained under such circumstances was of no avail, and that there was no contract by reason of the fraud of the clerk. *Simons v. the Great Western Railway Co.* 2 C. B. (N. S.) 826. *See* Com. Dig. Fait, B. 2.

[4] The company do not impliedly insure the safe carriage of passengers as they do with respect to goods delivered to them as common carriers. With respect to goods they are liable at all events, with the exception of loss by the act of God or the Queen's

(A) *What Degree of Care they must Exercise.*

(B) *Obligation to run Advertised Trains.*

DENTON v. GREAT NORTHERN RAILWAY CO. 5 E. & B. 865.

An action lies at the suit of a passenger damnified by a misrepresentation in the time tables

This was an action to recover damages by reason of the detention of the plaintiff, a passenger by the defendant's railway, in consequence of the train by which he travelled stopping short of the point to which it was advertised to run in the time-tables of the defendants.

Lord Campbell, C. J. "It seems to me, that if the company promised to give tickets for a train running at a particular hour to a particular place to any one who should come to the station and tender the price of the ticket, it is a

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enemies; but as to passengers, their undertaking goes no further than this, that so far as human care and foresight can go they will provide for their safe conveyance. Not being insurers, they are not responsible for accidents where all reasonable skill and diligence have been employed. For when everything has been done which human prudence, care, and foresight can suggest for the security of the passengers, an accident may happen. *Bird v. Great Northern Railway Co.* 28 L. J. Ex. 3. *Christie v. Griggs*, 2 Camp. 79. *Crofts v. Waterhouse*, 3 Bing. 319; Story, Bailm. s. 602. The responsibility of the company for injuries occasioned in the transport of passengers being, as we have seen, confined within narrower limits than that imposed by the character of insurers, the inquiry naturally presents itself, What is the nature and extent of that responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of passengers at all events, yet their undertaking and liability go to this extent, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. *Harris v. Costar*, 1 C. & P. 636. *Crofts v. Waterhouse*, 3 Bing. 321. *Ross v. Hill*, 2 C. B. 877. "But," says Mr. Justice Story, (Bailments, s. 601), "in what manner are we to measure this due care and diligence? Is it ordinary care and diligence which will make them liable for ordinary neglect? or is it extraordinary care and diligence which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose life, and limbs, and health are of great importance, as well to the public as themselves, the ordinary principle in criminal cases where persons are made liable for personal wrongs and injuries arising from slight neglect would seem to furnish the true analogy and rule. It has been accordingly held, that passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest neglect." *Aston v. Heaven*, 2 Esp. 533. *Christie v. Griggs*, 2 Camp. 79. *White v. Boulton*, Peake, 81. This stringent exaction of care on the part of carriers has been carried so far, that in one case *Lord Mansfield* laid down, that the occurrence of a coach accident, by which a passenger was injured, raised a *primâ facie* case of negligence against the proprietor. *Christie v. Griggs*, 2 Camp. 79. And the rule was recently stated in the same terms, with reference to a railway accident occasioned by the train going off the line. *Bird v. G. N. R.* 28 L. J. Ex. 3; 1 Ad. & E. 223; 5 Q. B. 751; 28 L. J. Ex. 3.

Although they are responsible for the slightest degree of negligence, which is a question for the jury (*Dudley v. Smith*, 1 Camp. 167), yet if an accident occur from the breaking of the axletree (*Christie v. Griggs, supra*); or from the horses taking fright, and no fault be imputable to the driver, an action cannot be supported by a passenger for any damage received (*Aston v. Heaven*, 2 Esp. 533); but the carriage itself (*Bremner v. Williams*, 1 Car. & P. Rep. 414; *Crofts v. Waterhouse*, 3 Bing. 321; *see* 2 Ex. 251), and horse-trappings must be shown to have been inadequate for the journey; and if, in consequence of the coach proprietors making default in these particulars, a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby he is injured, the proprietor is liable in damages. *Jones v. Boyce*, 1 Stark. 493; *Crofts v. Waterhouse*, 3 Bing. 321. And where an accident is occasioned by a stage-coach being loaded with a greater number of passengers than its strength or construction will allow it to bear, it is no excuse that the number does not exceed the statute allowance (*Israel v. Clark*, 4 Esp. 259); so, if the equilibrium of the coach be affected by the position of a passenger (*Aston v. Heaven, supra*), or if the reins be kept by the driver so loose in hand that he has no control over the horses, and an accident occur, any party injured may maintain an action against the coach proprietor (id.); so, if the road be such as to require any extraordinary degree of caution on the part of the passengers, the driver is bound to warn them of the full extent of the danger (*Dudley v. Smith*, 1 Camp. 167); and if he go so close to the side of the road that, for want of sufficient room an accident occur, his principal is liable (*Wordsworth v. Willan*, 5 Esp. 273): but there is no rule that a coach must

good contract with any one who so comes. I take it to be clear, that the issuing of the time-tables in this way amounts in fact to such a promise: any one who read them would so understand them. Then, is it a good contract in law? The consideration is one which is a prejudice to the person who makes his arrangements with a view to the fulfilment of the contract, and comes to the station on the faith of it. Is it not, then, within the principle of those cases in which it has been held that an action lies on a contract to pay a reward? There, the promise is to the public exactly as it is here; it is in effect the same as if made to each individual conditionally; and on an individual fulfilling the condition it is an absolute contract with him, and he may sue. But, on the other ground, there is no doubt the statement in the time-tables was untrue, and was made so as to be what the law calls a fraudulent misrepresentation. It was not the original printing that was blameable, but after notice that the train was withdrawn the defendants continue, down to the 25th March, to issue these tables. Was not that a representation that there was such a train? And as they knew it had been discontinued for some time, was it not a false representation? It is all one as if a person duly authorised by the company had said to the plaintiff, There is a train from Milford Junction to Hull at that hour. The plaintiff believes this and acts upon it, and sustains loss."

as to the running of trains.[1]

(C) *Bye-laws of Railway Company applicable to Passengers, and the Consequences of their Infringement.*[2]

always be kept on the left, or proper side of the road; and if an injury occur which might have been avoided had the coach been on its own side of the road, still a suit cannot be instituted if it arose from misfortune (*Aston v. Heaven, supra; see* 11 A. & E. 223); and, on the other hand, it will afford no defence that the driver kept to his own side of the road. *Mayhew v. Boyce*, 1 Stark. 423; 2 id. 57. The company are liable if accident from station not being sufficiently lighted (16 C. B. 184), or from collision (5 Ex. 787); but not where passengers in fault. 16 C. B. 179; 5 C. & P. 421; 3 Mee. & W. 244; 10 id. 546. The obligation to receive passengers is co-extensive with the accommodation the carriers are able to afford, and which seems to attach to carriers from an English to a foreign port (*Bennett v. Peninsular Co.* 6 C. B. 778; 18 L. J. C. P. 85; *see* 3 B. & B. 54); so as to luggage (2 B. & P. 419; 6 East, 564). As to quantity, *see* 8 Ex. 30. Husband and wife are entitled to double (Id.), but carriers are not bound to receive it if packed in an unsafe state (27 L. J. C. P. 308; 4 C. B. 676); but if they receive it in an unfit condition they are answerable. 10 Mee. & W. 161; 18 L. J. C. P. 251. The liability for luggage is the same as for other goods taken by carriers, unless loss occasioned from fault of passenger himself. 8 Ex. 30; 7 C. B. 839. The luggage is accessory to principal contract, and included in the fare, 12 C. B. 331; 21 L. J. C. P. 197.

[1] A return ticket which, according to its terms, or the conditions upon which it is issued, is to be available for certain trains, entitles the passenger to elect by which of such trains he shall return; and if the train by which he elects to return does not go beyond a station, short of that to which he ought to be carried, he is entitled to be indemnified against any expense or loss occasioned by such delay and detention on his journey. *G. N. R. Co. v. Hardcroft*, 21 L. J. Q. B. 178.

[2] The passengers are bound to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers, as well as for their own proper interests. (Story's Bail. s. 591.) Railway companies are expressly empowered to frame and promulgate bye-laws for regulating the travelling upon the railway, and to attach a penalty to their infringement. (8 & 9 Vic. c. 20, s. 108.) And if the infraction or non-observance of any such bye-law or other regulation be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, the company are justified summarily in interfering to obviate or remove such danger, annoyance, or hindrance, and that without prejudice to any penalty incurred by the infraction of any such bye-law. (8 & 9 Vic. c. 20, s. 109.)

The Board of Trade have framed the following bye-laws, which have in general been adopted: —

1st. "No passenger will be allowed to take his seat in or upon any of the company's carriages, or to travel therein upon the said railway, without having first booked his place and paid his fare. Each passenger booking his place will be furnished with a ticket, which he is to show when required by the guard in charge of the train, and to deliver up before leaving the company's premises, upon demand, to the guard or other servant of the company duly authorised to collect tickets. Each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started."

A person travelling with an annual ticket is a passenger within this bye-law, and as such subject to the penalty if he refuse to

(D) *Responsibility of Railway Company for wrongful Expulsion of Passenger.*[1]
(E) *Remedy in case of Single Journey over Continuous Lines.*[2]

CARRIERS, Larceny by.[3] *See* Larceny.

produce it when required. *Eastern Counties Railway Co. v. Woodward*, 9 W. R. 660.

2d. "Passengers at the road stations will only be booked conditionally—that is to say, in case there shall be room in the train for which they are booked; in case there shall not be room for all the passengers booked, those booked for the longest distance shall have the preference, and those booked for the same distance shall have priority according to the order in which they are booked.

3d. "Every person attempting to defraud the company by riding in or upon any of the company's carriages without having previously paid his fare, or by riding in or upon a carriage of a higher class than that for which he has booked his place, or by continuing his journey in or upon any of the company's carriages beyond the destination for which he has paid his fare, or by attempting in any other manner whatever to evade the payment of his fare, is hereby subjected to a penalty not exceeding 40*s*."

4th. "Smoking is strictly prohibited, both in and upon the carriages and in the company's stations. Every person smoking in a carriage is hereby subjected to a penalty not exceeding 40*s*.; and every person persisting in smoking in a carriage or station after being warned to desist shall, in addition to incurring a penalty not exceeding 40*s*., be immediately, or, if travelling, at the first opportunity, ejected from the company's premises, and forfeit his fare."

5th. "Any person found in the company's carriages or stations in a state of intoxication, or committing any nuisance, or otherwise wilfully interfering with the comfort of the passengers, and every person obstructing any of the company's officers in the discharge of their duty, is hereby subjected to a penalty not exceeding 40*s*., and shall immediately, or, if travelling, at the first opportunity, be removed from the company's premises, and forfeit his fare." *Coppin v. Braithwaite*, 8 Jur. 875. See *Prendergast v. Compton*, 8 C. & P. 454.

6th. "Any passenger cutting the lining, removing or defacing the number-plates, breaking the windows, or otherwise wilfully damaging or injuring any of the company's carriages, shall forfeit and pay a sum not exceeding 5*l*. in addition to the amount of damage done."

It would seem the company have no power to turn out disreputable persons, unless they have been guilty of some impropriety in the train. A bye-law may be proved by an examined copy, and it is sufficient proof of publication that a copy was affixed at the station where the party entered. *Motheram v. Eastern Counties Railway*, 29 L. J. C. P. M. C. 57; 5 C. B. 4.

[1] If a passenger be turned out of the train without cause by a servant of the company, the company will be responsible if the servant in so acting was discharging his duty to the company, or if the company ratify his act. It was at one time supposed that it was necessary, in order to fix the company with an unjustifiable expulsion of a passenger, to show that the company's guard or servant had been authorised by the company to do the act, or that the company had ratified the act after it was done. *Broom v. Eastern Counties Railway Co.* 6 Ex. 314. A recent case has, however, placed the matter on the more satisfactory basis, that there is an implied authority in the guards and servants of the company who are employed about the regulating and attending to the passengers, to act in the expulsion of persons improperly on the train, or misconducting themselves there, and that on this ground the company are responsible for an improper exercise of such authority. In the case in which it was so held, a passenger with a return ticket had been arrested for travelling without having paid his fare. He had left his half-return ticket behind, and, by mistake, taken a half ticket belonging to a relative, which was not available until three days later. He explained the circumstance, but his story was discredited, and the ticket collector informed the superintendent of the line, who gave the passenger into custody. The court held, an action was maintainable against the company for the false imprisonment. *Goff v. G. N. R. Co.* 30 L. J. Q. B. 148. Even in the case of a lawful expulsion, if the guard, or other officer having authority in that behalf, is guilty of excessive violence in expelling the passenger, and by his negligence and improper conduct the passenger is hurt, the company will be liable. *Greenwood v. Seymour*, 30 L. J. Ex. 327.

[2] Where a ticket is given for a journey over the continuous lines of several companies, the contract is a single contract with the company giving the ticket, and the remedy of the passenger for any delay happening during the journey in breach of such contract is against the first company, notwithstanding such delay may have happened on the line of another of the companies in the course of the transit. *Denton v. the G. N. R. Co.* 5 E. & B. 860. *Collins v. the Bristol and Exeter Railway Co.* 11 Ex. 790.

As to the damages recoverable in case the passenger is not carried to the end of his journey, the principle confining damages to such as immediately and naturally flow from the breach of contract in general restricts the damages in such a case to the traveller's hotel bill for the night, if he could not conveniently finish the journey on the same day, and any extra expense of travelling which he may reasonably have incurred (*Hamlin v. G. N. R. Co.* 26 L. J. Ex. 20), unless the special object of his journey be stated to the company. *See* 9 Ex. 341.

[3] The principle, that it was not felony in a bailee to convert to his own use the goods bailed to him, led to distinctions which

CASE, Action on the. *See* vol. i. p. 143.

against Carriers. *See* Carriers, *ante*, p. 29.

for Deceit. *See* Deceit.

Defamation. *See* Libel; Slander.

Disturbance of Common. *See* Common.

Disturbance of Pews. *See* Pews.

Disturbance of Watercourse. *See* Watercourse.

Disturbance of Way. *See* Easement; Way.

Excessive Distress. *See* Excessive Distress.

Malicious Arrest. *See* Malicious Arrest.

Malicious Prosecution. *See* Malicious Prosecution.

Negligence. *See* Negligence.

Nuisance. *See* Nuisance.

Obstruction of Light and Air. *See* Lights.

Infringing Patents. *See* Patent.

Slander of Title. *See* Slander.

CASE, Special. *See* Special Case.

CASSETUR Breve. *See* Abatement,[1] vol. i. p. 3.

CASTING Vote.[2]

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sometimes obtained for crime an immunity detrimental to the public welfare. This inconvenience is now abolished. The distinction was thus stated by *Lord Hale:*— "If a man deliver goods to a carrier to carry to Dover, and he carries them away, it is no felony; but if the carrier have a bale or trunk with goods in it delivered to him, and he breaks the bale or trunk, and carries away the goods *animo furandi*, or if he carries the whole pack to the place appointed, and then carries it away *animo furandi*, it is a felonious taking. But that must be intended where he carries them to the place and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking." But now, by the 24 & 25 Vic. c. 96, s. 3, "whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or for the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be convicted of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction." *See* 20 & 21 Vic. c. 51, s. 4, and 1 F. & F. 647; 2 id. 14.

[1] When the defendant has pleaded a sufficient plea in abatement, the plaintiff may enter on the roll a judgment that the writ be quashed, in order that he may be enabled to commence a new action. It is not necessary that he should obtain leave of the court to do so. Upon a *cassetur breve* entered by the plaintiff, neither party is entitled to costs. *Greenhill v. Shepherd*, 12 Mod. 145. *Poole v. Pembrey*, 1 Dowl. 693. The practice generally is not to sign a judgment or make any entry on a roll, but the prayer of judgment that the writ be quashed, and award that it be so, are copied on paper, and delivered to the defendant's attorney or agent, the same as a pleading. Chit. Arch. by Prentice, 1417.

[2] By 58 Geo. 3, c. 69, s. 2, in all cases of equality of votes in vestry, the chairman shall (in addition to such vote or votes as he may by virtue of the act be entitled to give in right of his assessment) have the casting vote. So the president or commissioner presiding at a meeting of the Poor-Law Board is to have a casting vote. *See* 4 & 5 Wm. 4, c. 76, s. 4. But a casting vote cannot be given by a bye-law. Therefore, where by the charter an election is to be made by the majority of a particular body, a casting voice, in case the votes are equal, cannot be conferred by bye-law on the presiding officer, for such alteration is not sanctioned by the charter. *R. v. Ginever*, 6 T. R. 732. *R. v. Bumstead*, 2 B. & Adol. 699. No officer of a corporation has a casting voice of common right. 15 Vin. Abr. 184, pl. 8. *Reg. v. Chapman*, 15 id. 214, pl. 4. But a casting voice may be given by charter or prescription. Id. *per Holt, C. J.: vide Anon.* 7 Mod. 12. *Anon.* 12. id. 232. Instances of casting voice given by charter, 3 T. R. 201; Grant, 249.

CASUS Omissus. *An omitted Case.* Where a *casus omissus* occurs in a statute, either through the inadvertence of the legislature, or on the principle, *Quod semel aut bis existit pretereunt legislatores* (D. i. 3, 6), the rule is, that the particular case thus left unprovided for must be disposed of according to the law as it existed prior to such statute, for *casus omissus et oblivioni datus dispositioni juris communis relinquitur.* 5 Rep. 38. When the words of a law extend not to an inconvenience rarely happening, but do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quæ frequentius accidunt.* But it is no reason when the words of a law do enough extend to an inconvenience seldom happening that they should not extend to it, as well as if it happened more frequently. Vaugh. R. 373. *See* Broom's *Max.* 37. Words cannot be supplied in an act by which a penalty is created. *Underhill v. Longbridge*, 29 L. J. M. C. 65.

CATALLA.[1]

CATHOLICS. *See* Roman Catholics.

Killing animal with intent to steal the carcase.

CATTLE Killing, with Intent, &c. 24 & 25 Vic. c. 96, s. 11. "Whosoever shall wilfully kill any animal with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony." *See* also Malicious Injuries to Cattle, &c.

CATTLE, Larceny of. 24 & 25 Vic. c. 96, s. 10. "Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

CATTLE, Liability of Owner of.[2] *See* also Animals, vol. i. p. 352; Drover.

CAUSA proxima non remota spectatur.[3]

CAVEAT Emptor. *Let a Buyer beware.*[4] *See* Deceit; Sale, Contract of; Vendor and Purchaser; Warranty.

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[1] Chattels, or catals, as formerly written. The term includes all property movable and immovable, except fees and freeholds.—*Termes de la Ley.*

[2] They may be sued for injuries arising from driving them along public thoroughfares. 6 Ex. 699; 20 L. J. Ex. 299. *See* 4 Ad. & E. 737; 12 id. 741.

[3] The immediate, not the remote cause, is looked at or considered. *Per Lord Ellenborough*, 12 East, 648; Bac. Ab. Reg. 1. This aphorism is chiefly applicable to marine insurances; that the loss must be a direct or immediate, and not a remote consequence of the perils insured against. *See* 2 Bing. 204; as applied to Agency, *see* Story on Agency, s. 217; *post*, Principal and Agent.

[4] It seems clear that, according to the civil law, a warranty of title was, as a general rule, implied on the part of the vendor of land; so that in case of eviction an action for damages lay against him at the suit of the vendee. With us, however, the negative of the above proposition holds, and it is accordingly laid down, that "if a man buys lands whereunto another hath title which the buyer knoweth not, yet ignorance shall not excuse him." *Doct. & Stud.* b. ii. c. 47. "By the civil law," as observed by *Sir E. Coke*, "every man is bound to warrant the thing that he sells or conveys, albeit there be no express warranty; but the common law binds him not, unless there be a warranty either in deed or in law; for, *caveat emptor.*" (102 a.)

With respect to the application of this maxim to goods, there is in general no implied warranty as to *title* or *quality* on sale of personal chattels (*Morley v. Attenborough*, 3 Ex. 500. *See* 2 Man. & G. 279; 14 Q. B. 621); and if a man purchase goods of a tradesman without in any way relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but if the tradesman be informed at the time the order is given of the purpose for which the article is wanted, the buyer relying on the seller's judgment, the latter impliedly warrants that the thing

CENTRAL CRIMINAL COURT. *See* also Indictment; Sessions.

I. Central Criminal Court Act, p. 53.
II. Removal into of Indictments for Offences committed out of the Jurisdiction, p. 57.
(A) *Allowance of Expenses in case of*, p. 58.

I. Central Criminal Court Act.[1]

furnished shall be reasonably fit and proper for the purpose for which it is required. *Brown v. Edgington*, 2 Scott, N. R. 504: *per Tindal, C. J.* See *Jones v. Bright*, 5 Bing. 533. *Gray v. Cox*, 4 B. & C. 108. *Wright v. Crookes*, 1 Scott, N. R. 685. Accordingly, where an agreement is for a specific chattel in its then state, there is no implied warranty of its fitness or merchantable quality. *Parkinson v. Lee*, 2 East, 314. *Laing v. Fidgeon*, 6 Taunt, 108. *Chanter v. Hopkins*, 4 Mee. & W. 399. *Power v. Barham*, 4 Ad. & E. 473. But if a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used. *Shepherd v. Pybus*, 4 Scott, N. R. 434. *Mondel v. Steele*, 8 Mee. & W. 858. *Ollivant v. Bailey*, 5 Q. B. 288. *Carnac v. Warringer*, 1 C. B. 356. *Chanter v. Hopkins*, 4 Mee. & W. 399. *Parsons v. Sexton*, 16 L. J. C. P. 181. *Street v. Blay*, 2 B. & Adol. 456. *Keele v. Wheeler*, 8 Scott, N. R. 323. *See* 10 Ex. 342, n.; 24 L. J. Ex. 165.

Where the vendor affirms that the thing sold has not a defect which is visible and obvious to the vendor, the rule *caveat emptor* applies. A person, therefore, who should buy a horse *knowing* it to be blind in both eyes, could not sue on a general warranty of soundness: *per Tindal, C. J. Margetson v. Wright*, 7 Bing. 605. See *Liddard v. Kain*, 2 Bing. 183. But if, without such knowledge on the part of the purchaser, a horse is warranted sound which in reality wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it has been held that an action on the case lies to recover damages for this imposition. *Butterfields v. Burroughs*, 1 Salk. 211.

A warranty is not necessarily implied from a simple recommendation of the quality of goods by the vendor; the rule of the civil law, that *simplex commendatio non obligat* (D. 4, 3, 37), has been adopted, and such commendation is, in most cases, regarded merely as an invitation to custom, for every vendor naturally affirms that his own wares are good. *Vernon v. Keyes*, 4 Taunt. 488. *West v. Jackson*, 16 Q. B. 282. *Chandelor v. Lopus*, Cro. Jac. 4. But if it appear on the evidence, or from the words used, that the affirmation at the time of sale was intended to be a warranty, or that such must be its necessary meaning, effect will be given to it as such. *Allen v. Lake*, 18 Q. B. 568. *Jones v. Clark*, 27 L. J. Ex. 165. *Verneste v. Weber*, 1 H. & N. 311. *Simond v. Braddon*, 2 C. B. (N. S.) 321. *Freeman v. Baker*, 5 B. & Adol. 797. In a purchase, therefore, without a warranty, a man's eyes, taste, and senses, must be his protection; and where the subject of the affirmation is mere matter of opinion (*Power v. Barham*, 4 Ad. & E. 473. *Jendwine v. Slade*, 2 Esp. 572), and the vendee may himself institute inquiries into the truth of the assertion, the affirmation must be considered a "nude assertion," and it is the vendee's fault from his own laches that he is deceived. *Per Grose, J.*, 3 T. R. 54. *Bayley v. Merrell*, Cro. Jac. 386. *Brass v. Maitland*, 6 E. & B. 470. *Risney v. Selby*, 1 Salk. 211. 2 Ld. Raym. 1118; Broom's *Max.* 701. *See ante*, vol. i. p. 304.

But if there be fraud it is otherwise, for "if two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew, at the time he stated it, not to be true, and if upon that statement of what is not true, and what is known by the party making it to be false, this contract is entered into by the other party, then, generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, and an action of damages grounded upon the deceit, and there will be a relief in equity to the same party to escape from the contract where he has so been inveigled into making by the false representation of the other contracting party." *Attwood v. Small*, 6 Clark & Fin. 444. *See* 2 Man. & G. 279.

[1] 4 & 5 Wm. 4, c. 36.—"An Act for establishing a new Court for the Trial of Offences committed in the Metropolis and Parts adjoining:"—

"Whereas it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis and certain parts adjoining thereto should be tried by justices and judges of oyer and terminer and gaol delivery in the city of London: Be it therefore enacted, that the Lord Mayor for the time being of the city of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the Judges for the time being of his Majesty's courts of King's Bench, Common Pleas, and Exchequer, the Chief Judge and the two other Judges in Bankruptcy, the Judge of the Admiralty, the Dean of the Arches, the Aldermen of the city of London, the Recorder, the Common Serjeant, the Judges of the Sheriffs' Court of the city of London for the time being, and

any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of his Majesty's superior courts of Westminster, together with such others as his Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the judges of a court to be called the 'Central Criminal Court,' to which his Majesty, and his heirs and successors, may direct his general commission as hereinafter mentioned; and which court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as hereinafter specified."

Sect. 2. "That it shall be lawful for his Majesty, his heirs and successors, from time to time to command and cause to be issued commissions of oyer and terminer to inquire of, hear, and determine all treasons, murders, felonies, and misdemeanors committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead St. Mary, Woodford and Chingford in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, that part of St. Paul Deptford which is within the said county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham, in the county of Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, that part of St. Paul Deptford which is within the said county of Surrey, Tooting Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink Liberty, and the district of Lambeth palace, in the county of Surrey; and also commissions of gaol delivery to deliver his Majesty's gaol of Newgate of the prisoners therein charged with any of the offences aforesaid, committed within the limits aforesaid; and that it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors, and all treasons, murders, felonies, and misdemeanors which might be inquired of, heard, and determined under any commission of oyer and terminer for the city of London or county of Middlesex, or commission of gaol delivery to deliver the gaol of Newgate, or which, in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city or the suburbs thereof as by the said commissions shall be appointed, or as the said justices and judges by virtue and in pursuance thereof, or any two or more of them, shall appoint, and to award and issue all precepts and process, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery: Provided always, that such court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid and act under such commission until a new commission shall be issued."

Sect. 3. "That the district situated within the limits of the jurisdiction hereinbefore established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and that in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows:—'Central Criminal Court to wit;' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed and averred to have taken place 'within the jurisdiction of the said court.'"

Sect. 4. "That the sheriffs of the city of London, and of the counties of Middlesex, Essex, Kent, and Surrey, respectively, shall execute and obey all precepts and process which the said justices and judges shall award, issue, and direct unto them respectively, and shall, whenever required and commanded, summon and return from the said city of London and county of Middlesex, and from the parts of the said counties of Essex, Kent, and Surrey within the limits of this act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognisable by the said justices and judges; and the persons so returned, whether taken wholly from the city of London or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials or relating thereto, notwithstanding that such persons are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise; and any person having served upon any grand jury or petty jury summoned and returned from the said counties of Essex, Kent, and Surrey, under the authority of this act, shall henceforth be exempt for and during twelve calendar months next after such service from the serving upon any jury in any court (except the sessions of the peace) to be holden for the county in which such juror shall reside."

Sect. 5. "That it shall be lawful for his Majesty, by and with the advice of his Privy

Council, from time to time to order and direct in what gaol, house of correction, or other prison, being within the limits of this act, any person or persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody; and that when and so often as his Majesty, by and with the advice of his Privy Council, shall be pleased to give such orders and directions, the said justices and judges of oyer and terminer and gaol delivery, and all justices of the peace, coroners, and other magistrates acting within the limits of this act, shall commit all persons charged or convicted before them to such gaol, house of correction, or other prison, as in such orders or directions shall be expressed and commanded, any law, usage, or custom to the contrary notwithstanding; provided nevertheless, and it is hereby declared, that the city, county, or place in which the offence of such person or persons was committed or alleged to have been committed shall be liable to and charged with the expense of supporting and maintaining such prisoner during his imprisonment in such gaol, house of correction, or other prison, at and after such rate as his Majesty, by and with the advice of his Privy Council, shall order and direct, and shall be paid by the treasurer of the said city, county, or place in which such offence was committed, or alleged to have been committed: Provided nevertheless, that the county of Middlesex and city of Westminster and liberty of the Tower of London shall not be liable to any charge for the support and maintenance of any prisoner charged with any offence in the said county, city, or liberty, or who shall be committed to his Majesty's gaol of Newgate."

Sect. 6. The Penitentiary at Milbank to be one of the prisons under the act.

Sect. 7. Persons under sentence of imprisonment for offences committed beyond the limits of the act may be removed to the Penitentiary at Milbank.

Sect. 8. The regulations of the Penitentiary acts to apply to prisoners confined by the authority of this act.

Sect. 9. Convicted persons may be imprisoned in the county gaol or Newgate, and in such latter cases the sheriffs of London may execute the judgment pronounced.

Sect. 10. Justices and coroners in Essex and Kent to commit offenders to Newgate, and justices and coroners in Surrey to commit offenders to Horsemonger Lane, and certify examinations to the court.

Sect. 11. Justices and coroners to specify that persons are committed under this act, and to take examinations, &c. as required under 7 Geo. 4, c. 64; and power is given to remove prisoners from the county gaol of Surrey to Newgate.

Sect. 12. Power to order payment of expenses to prosecutors and witnesses, and the treasurer of the county, or his agent, is to attend the court to pay orders.

Sect. 13. "That no bill of indictment for any misdemeanor (other than perjury or subornation of perjury), which can or may be presented to the grand jury at any sessions of the peace for the said city of Westminster and borough of Southwark, and counties of Middlesex, Essex, Kent, and Surrey respectively, in which such misdemeanor was committed or alleged to have been committed, shall be presented to the grand jury to be summoned under the authority of this act, unless the prosecutor or other person presenting such indictment shall have been bound by recognisance to prosecute or give evidence at the sessions to be held under the authority of this act against the person or persons accused of such misdemeanor, or unless such person or persons accused shall have been committed to or detained in custody, or shall be bound by recognisance to appear at the said sessions to be held under the authority of this act."

Sect. 14. "The court of the lord mayor and aldermen of London may contract with the justices of Essex, Kent, and Surrey, for the support of their prisoners in Newgate, and if they cannot agree the judges are to settle the amount."

Sect. 15. "That the said justices and judges of oyer and terminer and gaol delivery to be appointed under the authority of this act, or any two or more of them, shall hold a session for the said city of London and county of Middlesex, and the parts of the counties of Essex, Kent, and Surrey, hereinbefore mentioned, in the said city of London or suburbs thereof, at least twelve times in each and every year (and oftener if need be), such times to be fixed by general orders of the said court, which any eight or more of the said judges of his Majesty's courts of Westminster are hereby empowered to make from time to time."

Sect. 16. "That it shall be lawful for his Majesty's Court of King's Bench, or any judge thereof, or any commissioner of oyer and terminer and gaol delivery under this act, being a judge of any of the superior courts at Westminster, or the chief judge or any other judge of the Court of Bankruptcy, or the recorder for the said city of London for the time being, if such court, judge, or recorder shall think proper, to issue any writ or writs of *certiorari*, or other process, directed to his Majesty's justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, or either of them, commanding the said justices of the peace, or any or either of them, to certify and return into the said court of oyer and terminer and gaol delivery indictments or presentments found or taken before the said justices of the peace, or any of them, of any offences cognisable by virtue of this act, and the several recognisances, examinations, and depositions relative to such indictments and presentments, so that the same offences may be dealt with, tried, and determined by the said justices and judges of oyer and terminer and gaol

delivery; and also for the like purpose, by writ or writs of *habeas corpus*, to cause any person or persons who may be in the custody of any gaol or prison charged with any offences cognisable under this act to be removed into the custody of the keeper of the gaol of Newgate."

Sect. 17. "That the justices of the peace acting in and for the said cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, shall not, at their respective general or quarter sessions of the peace, or any adjournment thereof, try any person or persons charged with any capital offence, or with any of the following offences committed or alleged to be committed within the limits of this act; that is to say, housebreaking, stealing above the value of 5*l.* in a dwelling-house, horse-stealing, sheep-stealing, cattle-stealing, maliciously wounding cattle, bigamy, forgery, perjury, conspiracy, assault with intent to commit any felony, administering or attempting to administer poison with intent to kill or to do some grievous bodily harm, administering drugs or other things, or doing any thing with intent to cause or procure abortion, manslaughter, destroying or damaging ships or vessels, in the breaking of shops, warehouses, counting-houses, and buildings within the curtilage of dwelling-houses, killing sheep with intent to steal the carcases, the uttering of all forged instruments, and the various offences enumerated in the act passed in the first year of the reign of his present Majesty, intituled 'An Act for reducing into one act all such forgeries as shall henceforth be punished with death; and for otherwise amending the laws relative to forgery, forging the assay marks on gold or silver plate, and all the offences relating to coin enumerated in the act passed in the second year of the reign of his present Majesty, intituled 'An Act for consolidating and amending the laws against offences relating to the coin,' the abduction of women, bankrupts not surrendering under their commission or concealing their effects, breaking down bridges and banks of rivers, taking rewards for helping to stolen goods, personating any officer, seaman, or other persons in order to receive any wages, pay, allowance, or prize-money due or supposed to be due, or any out-pensioner of Greenwich Hospital in order to receive any out-pension allowance due or supposed to be due, sending threatening letters and using threats to extort money, larceny on navigable rivers and canals, and stealing and destroying goods in progress of manufacture, and larcenies after a previous conviction, embezzlement, larceny by clerks and servants, and receivers of stolen goods, whether such person or persons shall be charged as principal offenders or as accessories before or after the fact."

Sect. 18. "That every recognisance which shall have been or shall be entered into for the prosecution before his Majesty's justices of the peace aforesaid of any person for any offence cognisable under this act, and any recognisance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offence as of any person to answer our lord the king for or concerning any such offence, or to answer generally before such justice of the peace, shall, in case any such writ of *certiorari* or *habeas corpus* be issued for the purpose of removing such indictment or presentment, or such person so in custody as aforesaid, be obligatory on the parties bound by such recognisance to prosecute and appear and give evidence, and do all other things therein mentioned with reference to the indictment or presentment, or the person so removed as aforesaid, before the justices and judges of oyer and terminer and gaol delivery acting by virtue of this act, in like manner as if such recognisance had been originally entered into for prosecuting such offence, appearing, or giving evidence, or doing such other things before the said justices and judges of oyer and terminer, and gaol delivery: Provided that in cases of removal from the jurisdiction of justices of the peace for the said cities of London or Westminster, the liberty of the Tower of London, the borough of Southwark, or counties of Middlesex and Surrey, two days' notice, and in case of removal from the jurisdiction of the justices of the peace for the counties of Essex and Kent, one week's notice, shall have been given, either personally or by leaving the same at the place of residence, as of which the parties bound by such recognisance are therein described, to appear before the court of oyer and terminer and gaol delivery, instead of the said other justices: Provided also, that it shall be lawful for the court, judge, or recorder, who shall grant such writ of *certiorari* or *habeas corpus*, and it is hereby required that such court, judge, or recorder, shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognisance in such sum, and with or without sureties, as the court, judge, or recorder may direct, conditioned to give such notice as aforesaid to the parties bound by such recognisance to appear before the said court of oyer and terminer and gaol delivery, instead of before the said other justices respectively, and to do such other things as such court, judge, or recorder shall direct."

Sect. 19. Justices of peace may deliver over indictments found at sessions to the justices of oyer and terminer and gaol delivery.

Sect. 20. Justices to settle officers' fees, or a salary, and direct how the same shall be paid.

Sect. 21. Sessions of the peace not to be affected by the sessions holden in pursuance of this act.

Sect. 22. "That it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commissions to be issued under the authority of this act, or

II. Removal into of Indictments for Offences committed out of the Jurisdiction.

Indictments removed by certiorari into the Queen's Bench may be sent for trial to the Central Criminal Court.[1]

19 Vic. c. 16, s. 1. "Whenever any indictment or inquisition for any felony or misdemeanor, committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court, shall have been removed by writ of certiorari into her Majesty's Court of Queen's Bench, either before or after the passing of this act, and it shall appear to such court in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such indictment or inquisition should be tried at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or for such judge thereof in vacation, to order that such indictment or requisition shall be tried at the said Central Criminal Court."

And the Court of Queen's Bench may order any person charged with an offence committed out of the jurisdiction to be tried there, and a certiorari will thereupon issue.

19 Vic. c. 16, s. 3. "Whenever any person shall have been committed or held to bail for any felony or misdemeanor, committed or supposed to have been committed at any place out of the jurisdiction of the said Central Criminal Court, and it shall appear to the said Court of Queen's Bench in term time, or to any judge thereof in vacation, that it is expedient to the ends of justice that such person should be tried for such offence at the said Central Criminal Court, it shall be lawful for such Court of Queen's Bench in term time, or for such judge thereof in vacation, to order that such person shall be tried for such offence at the said Central Criminal Court; and thereupon a writ of certiorari shall be issued to the justices of oyer and terminer, or of gaol delivery, or of the peace, before whom any indictment or inquisition charging such person with such offence shall then be pending, or before whom any such indictment shall thereafter be found, or to the coroner before whom any such inquisition shall have been or shall thereafter be taken, commanding them or him to certify and return such indictment or inquisition into the said Central Criminal Court."

No objection can be taken to the certiorari, order, or other proceeding.

19 Vic. c. 16, s. 15. "It shall not be lawful for any person, by himself or by his counsel, to take any objection, either in the said Central Criminal Court or in the Court of Error to any writ of certiorari, or to any order of the said Court of Queen's Bench, or of any judge thereof, or to any other proceeding by virtue of which any indictment or inquisition shall have been removed into the said Court of Queen's Bench, or transmitted or removed under the provisions of this

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any two or more of them, to inquire of, hear, and determine any offence or offences committed, or alleged to have been done and committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England. And all indictments found and trials and other proceedings had and taken by and before the said justices and judges of oyer and terminer and gaol delivery, shall be valid and effectual to all intents and purposes whatsoever; and that it shall and may be lawful for any three of the said justices and judges of oyer and terminer and gaol delivery, to order and direct the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act of the seventh of George the Fourth."

Sect. 23. "That nothing in this act contained shall extend or be construed to extend to prejudice, or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, aldermen, and recorder of the city of London, or their successors, the sheriffs of the city of London and county of Middlesex, for the time being, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, aldermen, and recorder, for the time being, of the said city, did or might lawfully use or exercise; and that, notwithstanding any practice or custom of the said city of London to the contrary, it shall be lawful for the Lord Mayor's Court of the city of London to sit on any day on which any session of the peace, oyer and terminer and gaol delivery shall be held within the said city; and that all proceedings of the said Lord Mayor's Court, that could or might have been had or taken if such sessions were not held, shall and may be had and taken, any practice, custom, or law to the contrary notwithstanding."

Sect. 24. Commencement of act.

Sect. 25. Act may be altered this session.

Sect. 29. This act to be a public one.

[1] The defendant is removed to Newgate and is arraigned, pleads, and is tried in the Central Criminal Court as if the offence were committed within the jurisdiction (ss. 6 & 7). Recognisances are binding on the parties upon notice being given to them of the change of court. (19 Vic. c. 16, s. 10.)

act to the said Central Criminal Court, or to any caption of any court before which such indictment shall have been found, or to any matter or thing set out or appearing on the face of the record, save and except only to such indictment or inquisition alone."

(A) *Allowance of Expenses in case of.*

The court or a judge may order an allowance to the prosecutor not exceeding 20*l.*

19 Vic. c. 16, s. 25. "Whenever any application shall be made on behalf of her Majesty or of any prosecutor to the said Court of Queen's Bench, or to any judge thereof, for an order that any person charged with any offence shall be tried at the said Central Criminal Court under the provisions of this act, it shall be lawful for the said Court of Queen's Bench in term time, or for the said judge in vacation, to issue a certificate, upon the production of which the Commissioners of her Majesty's Treasury may order to be paid out of any monies provided by parliament for law charges in England to the person so charged, a sum not exceeding 20*l.*, to enable such person to defray the charges and expenses of the attendance of his witnesses: Provided that the sum so advanced shall be allowed for in the sum which, in the event of the acquittal of such person, may become payable under the order hereinafter mentioned."

Allowance of costs of removal to prisoner upon acquittal.

Id. sect. 26. "In case any person who shall be tried at the said Central Criminal Court under the provisions of this act, upon an application on behalf of her Majesty, or of any prosecutor, shall be there acquitted, it shall be lawful for the justices or judges of the said Central Criminal Court before whom any such acquittal shall have taken place, or for any two or more of them, to order re-imbursement to the person so acquitted of such sum as shall appear to them to have been properly expended for such removal of the trial of such person."

CERTAINTY. *See* Indictment; Pleading, &c.

CERTIFICATE. *See* Bankruptcy, vol. ii. p. 141; *post*, Evidence.

I. Of Births (*ante*, vol. ii. p. 502), Baptisms, Marriages, and Deaths. *See* Register.

II. Altering or Forging. *See* Forgery; and *see* 24 & 25 Vic. c. 98, s. 36.

III. Of Attorney. *See* vol. ii. p. 8.

IV. Under Statute 43 Eliz. c. 6, to deprive Plaintiff of Costs where Debt under 40*s.* *See* Debt.

V. Action of Trespass and on the Case where less than 40*s.* are recovered. *See* Torts; Trespass.

VI. That Defendant had probable Cause for pleading Pleas found against him. *See* Pleas.

VII. For Double Costs. *See* Double Costs.

VIII. For Taxation of Costs on Higher Scale where Debt recovered is under 20*l.* *See* Taxation.

IX. Under County Courts Acts. *See* County Courts.

X. For Special Jury. *See* Jury.

XI. To Deprive Plaintiff of Costs in Action of Tort where less than 5*l.* recovered. *See* Costs.

XII. Of Former Conviction. *See* Conviction.

CERTIFIED Copies. Copies signed and certified as true by the officer to whose custody the original document is entrusted. *See* Copy.

CERTIORARI.[1] As to removal of causes in the County Courts by, *see post*, County Courts. *See* Coroner; Poor Law; Sessions.

[1] A writ of certiorari is an original writ issuing out of the Court of Chancery, or the Queen's Bench, Common Pleas, or Exchequer, directed in the Queen's name to inferior judges or officers, commanding them to certify or to return the record of a case

I. Upon Nul Tiel Record Pleas. *See* Nul Tiel Record.

II. To verify Errors. *See* Error.

III. To remove Plaint in Replevin into Superior Court. *See* Replevin.

IV. Removal of Indictments into Central Criminal Court. *See* Central Criminal Court, *ante*, p. 57.

V. Amendment of. *See* vol. i. p. 343.

VI. Removal of Causes by, from Inferior Courts of Record not being County Courts, p. 60.

(A) *When the Writ lies*, p. 60.
(*a*) *Form of Certiorari*, p. 60.

(B) *How and within what Time sued out*, p. 61.

(C) *Bail, when required before Removal*, p. 61.

(D) *Of the Return of*, p. 61.
(*a*) *Form of*, p. 61.

(E) *Bail after Removal*, p. 61.

(F) *Proceedings after Removal*, p. 61.

(G) *Quashing the Writ by* Procedendo, p. 61.

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VII. To Remove Informations, Indictments, Convictions, Warrants, Orders, etc. p. 62.

(A) *It lies for the Removal of*, p. 62.
(*a*) *In general, all Judicial Proceedings of Inferior Courts*, p. 62.
(*b*) *Indictments*, p. 62.
(*c*) *Convictions, Orders, &c. of Courts of Quarter or Petty Sessions*, p. 63.
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(B) *Application for*, p. 65.
(*a*) *Time of Applying for*, p. 65.
(*b*) *Notice of Application for*, p. 65.
(*c*) *Of the Affidavit*, p. 65.
(*d*) *Recognisance of Defendant upon Removal*, p. 67.
(*e*) „ *of Prosecutor upon Removal*, p. 68.
(*f*) *Form of Writ*, p. 69.

(C) *Of the Return*, p. 69.

(D) *Quashing the Writ*, p. 69.

(E) *Costs*, p. 70.

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depending before them, to the end that the party may have the more sure and speedy justice before the queen, or such justices as she shall assign to determine the cause. 1 Bac. Ab. 349; F. N. B. 245; Com. Dig. Certiorari; Tid. Prac. 397. When it issues out of Chancery it is returnable in that court, and the record when brought up, if required in any other court, must be sent there by mittimus. Tid. Prac. 3, 9th ed.

VI. Removal of Causes from Inferior Courts of Record, not being County Courts.[1]

(A) *When the Writ lies.*[2]

(*a*) *Form of Certiorari.*[3]

[1] The 9 & 10 Vic. c. 95, abolishes most of the inferior courts and substitutes the county courts.

[2] The writ of certiorari is sued out when it is desired to remove the record of a cause, pending in an inferior court, into one of the superior courts. The writ may issue either at the instance of the plaintiff or defendant in the action below (*Landens v. Sheil*, 3 Dowl. 90), out of any one of the superior courts; and, with the exceptions hereafter specified, lies in all cases to remove any cause, even an ejectment (*Patterson v. Eades*, 3 B. & C. 550), out of an inferior court of record, whether the action were commenced by process against the person or not; but it must be issued before judgment (*R. v. Seton*, 7 T. R. 373), and delivered to the judge of the inferior court before any of the jury are sworn in the cause (43 Eliz. c. 5); and in cases where such judge is a barrister of three years' standing, it must be so delivered before issue of fact or law joined thereon, provided such joinder takes place within six weeks after appearance. If delivered after the time, a *procedendo* will issue, although the record has been filed in the court above. *Laverack v. Bean*, 3 Mee. & W. 62; 21 Jac. 1, c. 29, s. 3. But it does not lie in any case unless the debt or damages laid, or the value of the thing demanded, in the court below, exceeds 5*l.*, if the steward or judge of such court be a barrister of three years' standing, unless the action concern the freehold or inheritance, or title to lands, lease, or rent. 21 Jac. 1, c. 23, ss. 3, 5, 6. *See* also 12 Geo. 1, c. 29, s. 3. *Franks v. Guinee*, 7 Dowl. 607.

It does not lie where the action is maintainable in the inferior court only, as where the custom of a place makes a thing actionable there which is not generally a cause of action. *Pope v. Vaux*, 2 W. Black. 1060, *Watson v. Clerke*, Carth. 75. In case of a judgment by default, if the writ is not delivered until after the jury have assessed the damages on the writ of inquiry, the court will award a *procedendo*. *Smith v. Sterling*, 3 Dowl. 609. After removal, the cause proceeds in the superior court from the stage at which it had arrived in the court below. *Doe d. Sadler v. Dring*, 1 B. & C. 253.

Previous to the 1 & 2 Vic. c. 110, when debtors might be arrested on mesne process, the writ, where the defendant was held to bail under the process of an inferior court, and the cause was removed by the defendant (*Melsom v. Gardner*, Cowp. 116), was a writ of *habeas corpus cum causâ*: the inferior courts, by the removal of the person of the defendant, lost their jurisdiction over him; they could not, therefore, proceed with the cause, and the bail was discharged. Tidd's Pr. 404, 9th ed. Since that statute, however, defendants can no longer be held to bail in inferior courts, and this writ is rarely used. But it is still, it appears, available to remove proceedings by foreign attachment in the Lord Mayor's Court, if bail has been given. *Blanchard v. De la Cruée*, 9 Q. B. 860. And there are still cases where the writ lies to remove a cause after judgment. Steph. Lush, Pr. 758, n. (g).

The 19 Geo. 3, c. 70, which enables parties to remove records from inferior courts into the superior courts of Westminster, applies to courts of record only. *Steer v. Potter*, 9 Jur. 12. If a judge of an inferior court, we have seen, allows a writ of certiorari more than six weeks after issue joined, contrary to the 21 Jac. 1, c. 23, s. 2, a *procedendo* will issue, although the record has been returned and filed. *Laverack v. Bean*, 3 Mee. & W. 62; S. C. 6 Dowl. P. C. 111. *See* 6 Bing. 433; 2 Burr. 759. Where it is to remove a plaint from one of the new county courts, the leave of the court must be previously obtained (*see post*, County Courts); and also, it seems, where the action has been brought in a county palatine court (*James v. Davies*, 1 B. & C. 143); but in other cases it issues without leave, and as a matter of course. *Landens v. Sheil*, 3 Dowl. 90. Where a rule is necessary, it is absolute in the first instance. *Pawsey v. Goodsy*, 3 Dowl. 605.

Before obtaining the seal of the court to the writ, a *præcipe* must be delivered to the Master, which may be as follows:

—— } Certiorari for C. D., to remove,
to wit. } &c., returnable on
L. M., Attorney for C. D.

[3] The writ is as follows:—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Judge of the Court of [*or* County Court of] held at greeting:

We, being willing for certain causes to be certified of a plaint levied in our court before you against C. D., at the suit of A. B. in an action [on contract, *or according to the tenor of the plaint*] command you that you send to us [*or in the C. P.* to our justices, *or in the Exch. of P.* to the Barons of our Exchequer] at Westminster, on the day of A. D. the plaint aforesaid, all things touching the same as fully and entirely as it remains in our court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done therefore what of right we shall see fit to be done.

Witness [*name of Chief Justice, or in Exchequer of Chief Baron*] at Westminster, the day of A. D.

(B) *How and within what Time sued out.*[1]

(C) *Bail, when required before Removal.*[2]

(D) *Of the Return.*[3]

(*a*) *Form of.*[4]

(E) *Bail after Removal.*[5]

(F) *Proceedings after Removal.*[6]

(G) *Quashing Writ by* Procedendo.[7]

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[1] The writ is a judicial writ, and should be tested in term time, and made returnable on a day certain in term. *Symonds v. Dimsdale*, 2 Ex. 533.

Where there is a claimant in a proceeding by a foreign attachment, a joinder of issue with him is a joinder of issue within the meaning of 21 Jac. 1, c. 23, s. 2, and therefore a certiorari must issue within six weeks after that joinder. *Wait & another v. Coombes*, 6 Dowl. P. C. 127. *See* 2 Ld. Raym. 837; 1 Roll. Abr. Certiorari, c. 1; 12 Mod. 390.

[2] When the claim in an inferior court does not amount to 20*l.*, it cannot be removed, whether by writ of *habeas corpus* or otherwise, unless the defendant who is desirous of removing such cause enter into a recognisance for payment of the debt and costs in case judgment should pass against him. (19 Geo. 3, c. 70, s. 6.) The recognisance is by the defendant and two sureties, and is similar to that required in cases of the bringing of error. (19 Geo. 3, c. 70, s. 6.) The amount mentioned in the declaration is what is looked to; if that exceeds 20*l.*, no recognisance can be required, although the sum sought to be recovered be less than 20*l.* *Brady v. Veeres*, 3 Dowl. 416. The statute applies to actions of tort as well of contract, where the damages claimed are less than 20*l.*

On a removal from an inferior court of an action of trover, where the damages laid are less than 20*l.*, the recognisance to pay debt and costs, required by 7 & 8 Geo. 4, c. 71, s. 6, must be entered into. *Furnish v. Swann*, 10 B. & C. 458; 5 M. & R. 452. *See* 2 Camp. 525; 1 Esp. N. P. b. 31; Clayton, 122, pl. 114; 7 D. & R. 769; 2 Dowl. 408.

[3] By delivery of the writ all the proceedings in the court below are suspended. The certiorari is obeyed by transmitting the record itself formally made up, and not a mere transcript or copy of it, to the court into which the writ is made returnable. *Palmer v. Forsyth*, 4 B. & C. 401. *Francks v. Wicks*, 9 Dowl. 489.

If there are any circumstances in the case which prevent the certiorari from lying so as to remove the cause, the record of the inferior court will not be annexed to the return; but such circumstances must be specially stated therein.

[4] *Return of Proceedings in a Borough Court.*

Borough of, &c. [*as the case may be*]

I, E. F., Esquire, Mayor of the borough aforesaid [*or as the case may be*] to our Lady the Queen, do humbly certify that before the demand of the writ of our said Lady the Queen to me directed, and hereunto annexed, to wit, on the day of in the year of the reign of our said Lady the Queen, A. B. complained of C. D. [*&c. as in the plaint*], and that afterwards, and that before the coming of the aforesaid writ, to wit, on the day of at the said court of our said Lady the Queen, of the said borough, the said C. D. entered an appearance, and that afterwards, and also before the coming of the said writ, the said A. B. [*&c. according to the stage of the proceedings in the inferior court*]; and this is the tenor of the and process of the said plaint, had and prosecuted before me, the mayor of the borough aforesaid. (Signed) E. F., Mayor.

[5] Bail need not, in general, be put in after the removal of a cause from an inferior court; but where a cause commenced by foreign attachment in the Lord Mayor's Court is removed, the defendant must put in special bail. *Bastow v. Gant*, 21 L. J. Q. B. 377. *Day v. Paupiere*, 13 Q. B. 802.

[6] If the cause is removed by the plaintiff before declaration, he must take out "a four-day rule," either in term or vacation, requiring the plaintiff to declare, otherwise judgment. C. L. P. Act, 1852, s. 53; Reg. Gen. H. T. 1853, Pr. r. 115.

But the plaintiff is not bound to proceed, and the defendant cannot *non pros.* him for not declaring, for no day is given to the parties to appear in the court above. *Clack v. Dixon*, 3 M. & S. 93. *Clerk v. Mayor of Berwick*, 4 B. & C. 649. But if he fails to declare within the time for declaration, after appearance in case of an action commenced in such superior court, the defendant may sign judgment for his costs (*Davies v. James*, 1 T. R. 371); and the cause will be out of court if he do not declare within a year after the return of the writ. *Norrish v. Richards*, 5 Nev. & M. 268. If the cause is removed by the defendant before declaration, the plaintiff may call upon him, by a similar rule, to appear in the superior court (Reg. Gen. H. T. 1853, Pr. r. 117); otherwise a *procedendo*.

If the cause, whether the removal be by the plaintiff or by the defendant, be removed after declaration, the cause proceeds in the superior court in the same manner as if it had been commenced there.

[7] The certiorari may be quashed on motion, if it be sued out by the defendant,

(H) *Costs.*[1]

VII. To Remove Informations, Indictments, Convictions, Warrants, Orders, etc.

(A) *It lies for the Removal of—*

(*a*) *In general, all Judicial Proceedings of Inferior Courts.*[2]

(*b*) *Indictments.*[3]

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and it clearly appear from his admission that he has procured it for the purpose of delay. *Sanders v. Sheil*, 3 Dowl. 90. It will be quashed if it issued in a case where it did not lie, or if it were misdirected, or if it is bad in law in any other respect. *See* 2 Chit. Arch. by Prentice, 1267. Where the writ is quashed by the court or a judge, a *procedendo* is at the same time awarded.

[1] Reg. Gen. H. T. 1853, Pr. r. 117, provides that "if a cause be removed from an inferior court having jurisdiction of the cause, the costs in the court below shall be costs in the cause."

[2] The writ of certiorari is part of the machinery of the Court of Queen's Bench in its special capacity of a court having general superintendence of all the inferior courts. Even if the certiorari is taken away by statute, it would be granted to remove a conviction which had been obtained for fraudulent and collusive purposes: as, where a master maltster had procured the conviction of one of his servants under the excise acts, the certificate of which would operate as a bar to any prosecution against himself. *R. v. Gillyard*, 12 Q. B. 527. But where a certiorari is given in certain cases by a statute, and by a subsequent clause of the same statute it is provided that in a certain class of these cases the decision of the inferior authority shall be final, a certiorari does not lie in this last-mentioned class, the case being different from what it is at common law, where express words are required to take away the certiorari. *Ex-parte the Overseers of Napston*, 4 W. R. 561; 27 L. T. 124. Therefore, the disallowance by a district poor-law auditor of an attorney's bill, which has not been taxed previous to its being presented to the auditor, is, by virtue of the 7 & 8 Vic. c. 101, s. 39, final, and the disallowance cannot be removed by certiorari. (Id.) It lies to remove all judicial proceedings; and it has been held that an order of justices as to the fees of the clerk of the peace is a judicial proceeding. *Reg. v Coles*, 8 Q. B. 78. So it has been held to lie to remove a consent and approbation given by commissioners under a local act. *R. v. Aberdare Canal Co.* 19 L. J. Q. B. 251; 14 Jur. 735.

But a certificate for the admission of a lunatic into an asylum under 8 & 9 Vic. c. 100, s. 48, is not in the nature of a judicial proceeding so as to be removable by certiorari; and this objection may be taken on showing cause against a rule to quash the certificate after it has been brought up. *Rex v. Inhabitants of Hatfield Peverel*, 18 L. J. M. C. 225.

[3] In order to obtain a certiorari for the removal of an indictment from the quarter sessions, because difficult points are likely to arise, the specific grounds on which they are likely to occur must be shown. *R. v. Jowle*, 5 Ad. & E. 539; 5 Dowl. 435; 1 Nev. & P. 228.

Under the 4 & 5 Wm. 4, c. 36, s. 16, the Queen's Bench may make an order in the nature of a certiorari to remove an indictment for obtaining money by false pretences from certain sessions mentioned in the act to be tried at the Central Criminal Court, notwithstanding the 7 & 8 Geo. 4, c. 29, enacting that no indictment for obtaining money by false pretences shall be removed by certiorari. *Reg. v. Sill*, 1 Dears. C. C. 10; 21 L. J. M. C. 214. See *Reg. v. Butcher*, 9 Dowl. 135.

A certiorari will not lie to remove an indictment for keeping a disorderly house, whether instituted by a constable under 25 Geo. 2, c. 36, or by a private individual. *Reg. v. Sanders*, 9 Q. B. 235.

Where a separate information was laid against two persons under 1 Wm. 4, c. 32, s. 23, but at the hearing the evidence against both was taken at the same time, and they were convicted in the full penalty each, the court refused a certiorari, because the act having taken away the writ, there was no excess of jurisdiction which would justify its being issued. *Reg. v. Justices of Staffordshire*, 32 L. T. 105. It is not a ground for removing an indictment by certiorari from the Central Criminal Court that it may be bad in law. *R. v. Templar and others*, 1 Nev. & P. 91; 5 Dowl. P. C. 249.

The writ of certiorari at the instance of a *defendant* is taken away by the 25 Geo. 2, c. 36, s. 10, in the case of an indictment for keeping a gaming-house. *R. v. Fox*, 5 Dowl. 242. A defendant in an indictment for a misdemeanor surreptitiously obtained an acquittal, by not complying with the practice of the sessions, in giving notice of trial and bringing on the indictment for trial, after disposing of the felonies; but this court would not grant a certiorari to remove the indictment, in order to set aside the verdict. *R. v. Unwin*, 7 id. 578. Where a magistrate is indicted at a quarter sessions, he being in the commission for the county, and he has circulated among the other magistrates a printed account of the charges brought against him, it is a good ground within the 5 & 6 Wm. 4, 33, s. 1, for removing the indictment by certiorari. *Reg. v. Grover*, 8 id. 325. *Reg. v. Butcher*, 9 id. 135. The rule for removing an indictment, for non-repair of a road, from an inferior jurisdiction, is *nisi* in the first instance (*R.*

(*c*) *Convictions, Orders, &c. of Courts of Quarter or Petty Sessions.*[1]

v. the Inhabitants of Leeds, 5 Dowl. 123); but in *Reg. v. Spencer* (8 id. 127) it was held, that in order to remove an indictment for a misdemeanor by certiorari into this court, the rule is absolute in the first instance; but in the case of a felony it is *nisi*. (Id.)

Indictments, once removed into the Central Criminal Court may be removed thence into the Queen's Bench, although the statute under which the indictment is preferred takes away the certiorari. *Reg. v. Brier*, 19 L. J. M. C. 121; 14 Jur. 391.

[1] A certiorari lies to the justices at sessions to bring up the record of an acquittal remaining in the court (*Jackson v. Oakes*, 11 Jur. 1105), where the record was necessary to prove an averment in a declaration for malicious prosecution.

Where a certiorari has issued to bring up a conviction under which a party is in prison, the court will admit him to bail until the case is determined by the court. The proper course upon the return of a certiorari to remove a conviction is, that the case should be put into the crown paper. *Reg. v. Lord*, 16 L. J. M. C. 15.

Where an order of quarter sessions was defective in ordering costs to be paid to the clerk of certain commissioners instead of the clerk of the peace, the court refused to quash such order upon its being brought up by certiorari, holding that the defect was one of form only. *Rex v. Binney*, 1 E. & B. 810; 22 L. J. M. C. 304.

Where an order of sessions as to the repair of a highway, and the proceedings connected therewith are brought up on certiorari under 5 & 6 Wm. 4, c. 50, s. 108, to enable the sessions to obtain the opinion of the court on a particular point, the court will entertain that point only, and will not quash the order of sessions on another ground, even although it shows the order to be bad on the face of it. *Reg. v. Thomas*, 21 Jur. 713; 5 W. R. 321; 28 L. T. 303.

Where the clerk of the trustees of a turnpike-road, which was out of repair, had been summoned by a single justice; and two justices, at a special sessions for the highways, without allowing the clerk to show that the turnpike funds were insufficient, made an order convicting him in a penalty directing him to repair the road in a specified time; the court held, that though the certiorari was taken away by the act, the order was so entirely without jurisdiction that a certiorari might issue to bring up the order to quash it. *Reg. v. St. Alban's Justices*, 22 L. J. M. C. 142; 17 Jur. 531.

Where A., being convicted of having on his premises woollen material suspected of having been embezzled, applied for and obtained a case for the opinion of the Court of Queen's Bench, which was duly entered in the crown paper; but, before the hearing, he ascertained that the convicting justices were connected with the woollen trade, contrary to the 6 & 7 Vic. c. 40, s. 53, the court granted a rule *nisi* for a certiorari to be heard at the same time as the special case. *Reg. v. Justices of West Riding of Yorkshire*, 36 L. T. 459.

An order of removal, defective on the face of it, may be brought up, although there has been no appeal to the session. *R. v. Blaythwayte*, 15 L. J. M. C. 58; *Rex v. Willats*, 7 Q. B. 516; 14 L. J. M. C. 157.

When an order of justices is removed for the purpose of being enforced under the 12 & 13 Vic. c. 45, no certiorari is necessary. Where a statute restores the writ of certiorari previously taken away by a statute on the same subject, the Court of Queen's Bench is bound to examine the form of the proceedings below in the usual way, although jurisdiction is also conferred upon them to determine upon the merits by way of review or appeal. *Re Dent Boundaries*, 8 Q. B. 43.

Where a person has been taken into custody, and subsequently remanded on a charge which turns out to be false, the court will not grant a certiorari for the purpose of quashing the warrant under which he was remanded preliminary to his bringing an action, either against the parties giving him into custody or against the justices signing the warrant, for the former are entitled to whatever protection the warrant can afford them, and in an action against the latter the validity of the warrant will be tried. *Reg. v. Justices of Ely*, 4 W. R. 13 Q. B. 205.

Although a statute takes away a certiorari for the removal of proceedings by magistrates under it, that does not prevent the removal of an order of quarter sessions, where justices interested in the matter have voted in support of the order. *Reg. v. Commissioners for Paving Cheltenham*, 1 Gale & D. 167. A certiorari may be obtained to remove a recognisance which has been estreated by the quarter sessions, although that court has no power to estreat in that instance. *Reg. v. Justices of West Riding of Yorkshire*, 2 Nev. & P. 457. *See* M'Clel. 111; 1 M'Clel. & Y. 27; 7 B. & C. 293; Parker's Rep. 54; Cro. Car. 498; 3 Bulst. 220; 1 Rolle's Abr. Execution, o, pl. 4, p. 900; 7 Bac. Arb. 513, Surety of the Peace; and *Scire Facias* (C. 2); Cro. Jac. 412. Where a private act of parliament takes away the certiorari for the removal of a proceeding under it before a court of quarter sessions, the Court of Queen's Bench will not grant a *mandamus* to amend the entry of that proceeding by the quarter sessions. *Rex v. Justices of West Riding of Yorkshire* in the matter of the Aire and Calder Navigation, 1 Ad. & E. 563; 3 Nev. & M. 802. The certiorari to remove orders of quarter sessions on appeals against borough rates is taken away by 5 & 6 Wm. 4, c. 76, s. 132. *Reg. v. Justices of Ripon*, 7 Ad. & E. 417; 2 W. & P. 411. *See* 1 Nev. & P. 756; 2 T. R. 89; id. 735; 5 B. & A. 773; 1 W. & P. 32.

The court will not grant a certiorari to remove an order of quarter sessions, where

(*d*) *Resolutions and Orders of Commissioners.*[1]
(*e*) *Inquisitions under the Lands Clauses Consoildation Act.*[2]
(*f*) *Proceedings in Courts-Martial.*[3]

it appears that the order is good on the face of it, and that the court has jurisdiction to make it. *Reg. v. Justices of Cheshire*, 8 Ad. & E. 398; 4 B. & A. 86; 4 B. & C. 844; S. C. 7 D. & R. 334; 8 B. & C. 137; S. C. 2 M. & R. 172; 1 M. & S. 446; 4 Burn's *Just.* 1202, ed. by D'Oyly & Williams, 4 Ad. & E. 695; 2 id. 241; S. C. 4 Nev. & M. 252; 2 East, 244; 5 B. & C. 816; 5 id. 818, n.; 5 T. R. 629; 3 East, 342; 1 Cowp. 139; 2 Ld. Ken. 164; 1 M. & P. 703; 3 Nev. & P. 406. An order made by county justices, authorising contracts with the council of a borough to maintain borough prisoners, though made in pursuance of 5 Geo. 4, c. 85, s. 1; and the 5 & 6 Wm. 4, c. 76, s. 114, is virtually under the former act, and the certiorari is not taken away by s. 132 of the latter statute. *Reg. v. Justices of Lancashire*, 11 Ad. & E. 144; 3 Per. & D. 86. *See* 4 B. & A. 289; 3 id. 250; 3 id. 887; 7 Ad. & E. 417; Nev. & P. 411; 4 Rep. 32, b.; 9 id. 117, b.

The court refused a certiorari to bring up a conviction for a common assault, under the 6 Geo. 4, c. 31, s. 27, on the ground of an alleged excess of jurisdiction, the conviction itself showing no excess of jurisdiction, and the depositions disclosing none. *Anon.* 1 B. & Adol. 382. The certiorari, in cases of convictions under the 6 Geo. 4, c. 63, for employing factory children at improper times, is abolished by reference of its provisions to those of 43 Geo. 3, c. 73. *Rex v. Fell*, 1 B. & Adol. 380.

The 24 & 25 Vic. c. 100, for consolidating the statutes relating to offences against the person, sect. 72, provides that "no summary conviction under this act shall be quashed for want of form, or be removed by certiorari into any of her Majesty's superior courts." So the statute consolidating those relating to larceny, 24 & 25 Vic. c. 96, s. 111, contains a similar enactment, that "no conviction or adjudication made on an appeal therefrom shall be quashed for want of form, or be removed by certiorari into any of her Majesty's superior courts of record." A like clause is contained in the Malicious Injuries to Property Consolidation Act, 24 & 25 Vic. c. 97, s. 69.

[1] A certiorari will not lie to bring up a resolution of vestry for the appointment of paid constables under the 5 & 6 Vic. c. 109, s. 18, nor the copy of such resolution forwarded to the justices in special session on which they made the appointment; but it will be to bring up the appointment itself, made by the justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to the 58 Geo. 3, c. 69, & 59 Geo. 3, c. 35, a poll having been demanded and refused, and the resolution being carried by a show of hands. *Re Hipperholme cum Brighouse, Constables of*, 5 D. & L. 79.

A certiorari will not issue to bring up an order of the Metropolitan Board of Works awarding compensation to an officer under s. 214 of the 18 & 19 Vic. c. 120, the 230th section taking away the writ. *Reg. v. the Metropolitan Board of Works*, 27 L. J. Q. B. 5; 22 Jur. 25.

If the jurisdiction of commissioners under the 52 Geo. 3, c. 93, to convict for unlawfully using a dog and gun, appears on the face of the conviction, the court will not grant a certiorari, unless it is sworn that they have no jurisdiction. *Rex v. Long*, 1 M. & R. 139.

[2] A jury had been impanneled under the Lands Clauses Consolidation Act, 8 Vic. c. 18, to assess the amount of compensation to be paid to a landowner for land compulsorily taken, and other lands injuriously affected by severance, &c. The landholder claimed the expense of erecting a bridge to connect his premises with the highway which was severed by the line. The jury found a gross sum for the purchase of the lands required by the company, a sum for severance, and a sum for severance owing to the crossing and the expense incurred thereby. Evidence was given that this last sum would be the expense of the bridge. The court held that the jury were not warranted in awarding the latter sum, inasmuch as that was a matter for the adjudication of justices under 8 Vic. c. 20, s. 69, and as this was an excess of jurisdiction, a certiorari would lie to remove the proceedings, notwithstanding s. 145 of 8 Vic. c. 18, which takes away the writ. *South Wales Railway Co. v. Richards*, 18 L. J. Q. B. 310.

Where an inquisition under a railway act was taken before a deputy appointed by the sheriff, although not authorised so to do by the act, the court refused a certiorari to remove the inquisition. *Reg. v. Sheffield and Manchester Railway Co.* 11 Ad. & E. 194; 3 Per. & D. 111. So, where a jury sitting on an inquisition to assess damages under a railway act were taken from the common jury list instead of the special jury list, as required by the act, and assessed compensation for land taken beyond the line limited by the act, a clause in the act taking away the certiorari in respect of all proceedings taken under it, the court refused a certiorari, notwithstanding the objection. *Reg. v. Bristol and Exeter Railway Co.* 11 Ad. & E. 202; 1 Per. & D. 170. And if a party by his conduct waives a notice of an inquisition provided by an act of parliament, he cannot afterwards obtain a certiorari to remove that inquisition for the purpose of quashing it, on the ground that it does not set forth the required notice or the waiver of it. *Reg. v. Committee-men of South Holland Drainage*, 8 Ad. & E. 429; S. S. 1 Per. & D. 79.

[3] *As to Courts-martial.* — The Court of

(*g*) *Proceedings in Colonial Court.*[1]

(B) *Application for.*[2]

By the 5 & 6 Will. 4, c. 33, "whereas it is expedient to prevent prosecutors of indictments and presentments from vexatiously removing the same out of inferior courts into his Majesty's Court of King's Bench; be it therefore enacted, that, from and after the passing of this act, no writ of certiorari shall issue from the Court of King's Bench at Westminster for removing into that court any indictment or presentment from any court of session, assize, oyer and terminer, or gaol delivery, or any other court, at the instance of the prosecutor or any other person (except his Majesty's Attorney-General), without motion first made in the Court of King's Bench or before some judge of that court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may now be made, and leave given where such application is made on the part of defendants; any law, practice, or usage to the contrary in anywise notwithstanding."

Not to issue to remove indictments, &c. to the Court of Queen's Bench by prosecutors, without leave of the court.

(*a*) *Time of Applying for.*[3]

Queen's Bench held that where the military *status* alone of a person is affected by the sentence of a court-martial, they would not interfere to control the jurisdiction of the court. And, therefore, where a military officer was found guilty of an offence and sentenced by a court-martial to be dismissed the service, the court refused a certiorari to bring up the proceedings, on a suggestion that the court-martial had no jurisdiction over the offender. And it seems that the Court of Queen's Bench has no jurisdiction to grant a certiorari to bring up the proceedings of a court-martial in India, notwithstanding documents may be in the custody of the Judge-Advocate-General in England. *In re Mansergh*, 30 L. J. Q. B. 296. *See* Courts-Martial.

[1] The Court of Queen's Bench will not grant a writ of error on the record of a conviction by the supreme court of a colony without the fiat of the Attorney-General; nor without such fiat for a writ of error will the court grant a writ of certiorari to remove from the supreme court of a colony the record of a conviction after judgment, except under very peculiar circumstances, and to prevent manifest injustice. *Re Lees*, 6 W. R. 660; 31 L. T. 247.

[2] The motion for must be by counsel. 5 & 6 Wm. and Mary, c. 11, s. 2. It is a rule absolute in the first instance in misdemeanors, *nisi* in felonies. 8 Dowl. P. C. 127. In moving to bring up depositions taken before a coroner or magistrate, with a view to admitting a party committed for trial on a charge of murder or manslaughter, it is the proper course to produce copies of such depositions verified by affidavit *Reg. v. Bartholemy*, 1 Dears. C. C. 60; 17 Jur. 184.

The certiorari may issue *ex-parte* in vacation. A fiat of a judge at chambers may be granted in the first instance, without a rule to show cause. *Reg. v. Newton Ferrars*, 9 Q. B. 32, overruling *Reg. v. Chipping Sudbury*, 3 Nev. & M. 204.

A certiorari had issued to the justices at sessions requiring them to return a conviction by A. and B., two justices assigned to hear and determine divers felonies, &c. of T. T. on the 22d of September, 1846, for certain trespasses and contempts against the 7 & 8 Vic. 112. The sessions returned the conviction, which had been filed, and which appeared to have been made by A. and B., two justices of the borough of N., for a single act of harbouring seamen under that statute, and did not set out the evidence on which it proceeded. On November 21 a rule for *concilium* was obtained, and the case set down for argument, and the points declared on the 16th of January. A rule was then obtained to quash the certiorari, and have the conviction taken off the file and returned to the justices, for the purpose of amending it by inserting the evidence taken. The court, in its discretion, discharged the rule; for the real conviction having been returned by the sessions, the variance between it and the statement in the certiorari was held to be immaterial. *Reg. v. Turk*, 10 Q. B. 540; 16 L. J. M. C. 114.

[3] A certiorari must, under all circumstances, be sued out within six calendar months from the time of making the order of sessions; and if a certiorari has removed an order from one sessions subject to a case, and on rehearing the case at another sessions an order is made, the certiorari issued to remove the first order cannot operate upon the second; but the party complaining of the second order must sue out a fresh certiorari within the time limited by the 13 Geo. 2, c. 18, s. 5. *Rex v. Bloxam*, 1 Ad. & E. 386; 3 Nev. & M. 385. *See* 1 Burr. 283; id. 479; id. 832.

But an application for a certiorari may be made any time within six calendar months from making an order of quarter sessions confirming an order of justices made more than six months previous to the application. *Rex v. Justices of Middlesex*, 5 Ad. & E. 626; 1 Nev. & P. 92. *See* 4 T. R. 281; 10 B. & C. 477; 1 M. & S. 734.

Where, during the Easter vacation, the party went to judge's chambers within the six months, and after due notice to the justices, and no judge attending at chambers within the six months, the writ was refused.

(*b*) *Notice of Applying for.*[1]
(*c*) *Of the Affidavit.*[2]

Re Llanbeblig, 15 L. J. M. C. 92. So, where a writ obtained within six months was quashed for defective notice, a second, after the six months, was refused. *Reg. v.* ——, 15 L. J. M. C. 28. But an order of sessions confirmed upon appeal to the sessions, may be removed within six months from the date of the confirmation. *Reg. v. Morice*, 14 L. J. M. C. 14; 2 D. & L. 952.

The certiorari cannot be issued before the fiat of the judge is obtained. *Reg. v. St. Mary, Whitechapel*, 2 Dowl. N. S. 964.

Where the sessions granted a special case, which has not been settled for more than six months after being granted, the certiorari for removing the orders of magistrates and sessions must be sued out within six months from the time of granting the case. If it is not so sued out, this court will not grant a *mandamus* to compel the sessions to enter continuances and hear the appeal. *Rex v. Justices of Staffordshire*, 1 Dowl. 484.

[1] On applying to remove an indictment, it is not necessary that the prosecutor should have notice, but when necessary the notice must show that it is given by the party making the application, and his identity must be shown by affidavit, as well as that of the justices served with those making the order; and consenting to the enlargement of the rule does not waive the objection. *Reg. v. How and others*, 11 Ad. & E. 159; 4 Per. & D. 320; 9 Dowl. 501. *See* 4 B. & A. 289; 3 B. & Adol. 887; 9 Dowl. 524. By 13 Geo. 4, c. 18, s. 5, on removing any prosecution, judgment, order, or other proceedings before any justice or quarter sessions, six days' notice must be given before motion.

A notice of an application for a certiorari on behalf of the churchwardens and overseers is not sufficient, if only signed by one churchwarden. *Rex v. Justices of Cambridgeshire*, 3 B. & Adol. 887. *See* 4 id. 289.

A notice on behalf of a parish by an attorney, of an intention to apply for a certiorari, is sufficient under 13 Geo. 2, c. 18, s. 5; but there must be sureties on behalf of the parish, besides two other sureties, pursuant to 5 Geo. 2, c. 9, s. 2; and if the certiorari has been issued in due time, the period for giving the sureties may be enlarged. *Rex v. Abergele*, 5 Ad. & E. 795; 1 Nev. & P. 235. *Reg. v. Justices of Lancashire*, 11 Ad. & E. 144; 3 Per. & D. 86. *See* 3 B. & Adol. 887; 4 B. & A. 289; 4 T. R. 281.

If a party gives the notices required by 13 Geo. 2, c. 18, s. 5, in order to obtain a certiorari, and then abandons his proceedings, another party cannot issue the writ. *Rex v. Justices of Kent*, 3 B. & Adol. 250. *See* 4 id. 289.

A notice of application for a writ of certiorari, signed in the name of a solicitor, who describes himself "solicitor for the present churchwardens and overseers of Market Harborough," is sufficiently signed, pursuant to 13 Geo. 2, c. 18, s. 5. *Reg. v. Solly*, 9 Dowl. P. C. 115. So, notice of an intended application for a certiorari to remove an order of justices in quarter sessions, made on the hearing of an appeal, stated the names of the appellant and of the respondent, and was signed by "J. B. attorney for the respondents;" and the notice was given to three justices, who were sworn to have been present at the trial and hearing of the appeal:—*Held* a sufficient notice under 13 Geo. 2, c. 18, s. 5. *Reg. v. Justices of Wilts*, 9 Dowl. 524. It is not necessarily too late to object to the service of the notice after writ issued, although the consequence may be, that if the writ be quashed it will be too late to sue out a fresh one. It is competent for the parties in an appeal to object to the notice to justices previous to obtaining a certiorari. (Id.)

The notice must be given to two of the justices who were present at the hearing, or at the particular time when the order was made, for if it merely state their presence at the sessions it will be insufficient, and their names being mentioned in the caption of the order will make no difference. *Reg. v. Darton*, 9 D. & L. 492. *Reg. v. Cartworth*, 5 Q. B. 201. *Reg. v. Gilberdike*, 5 Q. B. 207. *Reg. v. St. James, Colchester*, 20 L. J. M. C. 203. But see *Reg. v. Seven Oaks*, 7 Q. B. 136; 14 L. J. M. C. 92.

The notice may be of an intention to move for the certiorari in six days from giving the notice, or as soon after as counsel can be heard. *R. v. Rose*, 3 D. & L. 359; 15 L. J. M. C. 6. And it may be signed by the attorney for the parish. *Reg. v. Seven Oaks, supra.*

If the writ is obtained on an affidavit showing due service upon the justices present at the time of making the order, a rule *nisi* to quash the writ on affidavits denying the presence of one of the justices must be moved for promptly. Where the certiorari was issued in December, 1848, and a rule *nisi* to quash the order was obtained in Easter term, 1849, a motion in Michaelmas term to quash the certiorari was held too late. *Reg. v. Basingstoke*, 6 D. & L. 302; 19 L. J. M. C. 28.

Where an order of sessions has been returned to the Court of Queen's Bench under a certiorari, and a rule is then obtained to quash the order, it is a good preliminary objection to an argument on such rule that no notice of it has been served on the justices who made the order, although served on the parties interested in supporting it. *Reg. v. Spackman, in re the Blandford Roads*, 9 Dowl. P. C. 1060. In order to obtain a certiorari, it is not sufficient to serve the notice, under 13 Geo. 2, c. 15, on one justice present at the sessions making the order, and another justice of the same county not present. *Rex v. Rattislaw*, 5 Dowl. 539.

[2] A certiorari having issued without an affidavit, or order of a judge, directed to a

(*d*) *Recognisance of Defendant upon Removal.*

Court to which delivered may bail or commit.

19 Vic. c. 16, s. 9. "Whenever any writ of certiorari shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, it shall be lawful for such court either to require any person who shall be attending such court under any recognisance,[1] with so many sureties and in such sum or sums of money, and with such condition for his appearance, and taking his trial upon such indictment or inquisition whenever and wherever the same shall be tried, as to such court shall seem fit, or to commit such person to the common gaol or house of correction for the county or place for which such court shall be holden, there to remain until he shall be removed under the provisions of this act, or otherwise delivered by due course of law."

Defendant to enter into recognisance before removing indictment.

By the 5 & 6 Wm. 4, c. 33, s. 2, "whereas it is expedient to extend the powers of an act passed in the fifth year of the reign of King William the Third and Queen Mary, intituled 'An Act to prevent Delays of Proceedings at the Quarter Sessions of the Peace;' be it therefore enacted, that, instead of the recognisance now by law required to be entered into before the allowance of a writ of certiorari, every person indicted or presented in any court of session, assize, oyer and terminer, gaol delivery, or any other court, who shall obtain a writ of certiorari for removing any indictment or presentment whatever into the Court of King's Bench, not being in custody for want of bail to answer such indictment or presentment, shall, before the allowance of such writ, enter into a recognisance before one of his Majesty's justices of the Court of King's Bench, or before a justice of the peace of the county or place in which the offence is charged to have been committed, or in which such person shall reside, in such sum and with such sureties as the said Court of King's Bench, or one of his Majesty's justices of the said court, shall by indorsement on the said writ order and direct; which recognisance shall contain the same conditions as are now by the said act, and another act passed in the eighth and ninth year of the reign of King William the Third, intituled 'An Act to make perpetual and more effectual an Act intituled "An Act to prevent Delays at the Quarter Sessions of the Peace,"' required in cases of indictments, removed from the general quarter sessions of the peace; and thereupon all the clauses and provisions contained in the said several acts with respect to costs or otherwise shall extend to such last-mentioned recognisances; and every person being in custody for want of bail to answer the charge contained in such indictment or presentment, shall be detained in custody until the like recognisances as are hereinbefore directed to be entered into (previous to the allowance of such writ of certiorari) shall have been entered into, or until such person be discharged by due course of law."[2]

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clerk of a court of requests, not a commissioner, to remove a plaint of debt levied there, the court set it aside. *Ex-parte Phillips*, 2 Ad. & E. 586. *See* 5 B. & C. 206; 2 Bing. 463; S. C. 10 Moore, 32, 171.

The affidavits should not be entitled in any cause; if entitled, they cannot be read. *Ex-parte Wallwork*, 4 D. & L. 403; 10 Jur. 967. But affidavits for a rule *nisi* to set aside a rule absolute for a certiorari before it is issued, may be entitled in the Queen's Bench, without naming the parties in the proceedings. *Reg. v. Chesemore*, 12 Jur. 11. It must fully disclose the grounds for requiring the removal.

[1] If the person charged with the offence is in prison, the court has no power to discharge him out of prison, but he must remain therein until he is discharged under the provisions of the act, or otherwise discharged by due course of law. Sect. 11.

[2] The 16 & 17 Vic. c. 30, s. 4, enacts, "that whenever any certiorari to remove any indictment into the Court of Queen's Bench shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment; and whenever any such writ of certiorari shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of certiorari awarded at the instance of the defendant), with the condition following, that is to say, that the said prosecutor shall pay to the defendant or defendants, in case he or they

(*e*) *Recognisance of Prosecutor upon Removal.*

Recognisance must be entered into by prosecutor upon removal.

By the 19 Vic. c. 16, s. 8, "whenever any certiorari shall be delivered to any court for the purpose of removing any indictment or inquisition from such court, such court shall require any person who shall be attending any such court, or under any recognisance or subpœna to prosecute, or to prosecute and give evidence, or to give evidence upon the trial of such indictment or inquisition, to enter into a recognisance, in such sum of money as to such court shall seem fit, to prosecute, or to prosecute and give evidence, as the case may be, upon the trial of such indictment or inquisition, whenever and wherever the same shall be tried."

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shall be acquitted, his or their costs incurred subsequent to such removal." This does not extend to any writ of certiorari awarded at the instance of her Majesty's Attorney-General (s. 8). The sureties for the defendant will not be discharged until payment of the prosecutor's costs, in case the defendant be convicted. *Reg. v. Hodgson*, 7 Ex. 915. *R. v. Bezant*, 7 Dowl. 680. *Reg. v. Hawdon*, 1 Q. B. 464.

The 5 & 6 Wm. 4, c. 33, as to writs of certiorari, has made no difference in the effect of a writ of certiorari in removing an indictment; and therefore, though issued at the instance of certain defendants, it will remove it against all, and the fact of the recognisances of the other parties being consequently discharged is immaterial. *R. v. Boxal and others*, 4 Ad. & E. 513. Where a certiorari was issued at the instance of a *prosecutor*, it was not necessary for him to enter into the recognisances required by the 5 Geo. 2, c. 19, s. 2. *Reg. v. Spencer*, 9 Ad. & E. 485; 1 Per. & D. 358. *See* 6 Nev. & M. 28.

If a defendant removes an indictment by certiorari, entering into the usual recognisances, he is only liable for the costs of those counts on which he is convicted. *Reg. v. Hawdon*, 11 Ad. & E. 143.

If one of several defendants in an indictment has entered into the usual recognisances on obtaining a certiorari, he cannot be compelled to proceed sooner to trial than the usual practice requires, although delay in the trial of the others will be the consequence. *R. v. Newton, Hunt, and others*, 2 Nev. & P. 121.

An indictment may be removed on the application of one defendant without the consent of the others, if the defendant enters into recognisances to pay costs if either himself or any of the other defendants are convicted. *R. v. Foulkes*, 20 L. J. M. C. 196.

And where several defendants were indicted for a misdemeanor, one was in custody on the charge, the others were out on bail, the court, on the application of one of the defendants who was out on bail, granted a certiorari to remove the indictment on the terms that, if the defendant in prison did not consent, the applicant was to find bail for him. *Reg. v. Drake*, 22 L. J. Q. B. 304. And in granting the certiorari the judge may, notwithstanding the 16 & 17 Vic. c. 30, s. 5, require that the condition of the recognisance shall be that he should be liable in the event of either of the defendants being convicted. *Reg. v. Jewell and another*, 26 id. 177; 21 Jur. 689.

The affidavit supporting an application to remove an inquisition under a railway act should state positively on oath what the objections to it are, or set forth a copy of it; and if they are not so stated, the court will not allow the application to succeed or to be renewed on amended materials. *Reg. v. Manchester and Leeds Railway Co.* 8 Ad. & E. 413; 3 Nev. & P. 439; 1 Per. & D. 164.

The defendant had removed an indictment by certiorari, and had entered into the usual recognisances, with two sureties. After a verdict of guilty at the assizes, he obtained a rule for a new trial, on payment of costs. Without paying costs, he gave notice of trial for the next assizes to the prosecutor, who obtained a judge's order, by which, if the costs were paid by a certain day, the notice of trial was to stand good, but otherwise was to be set aside. The defendant did not pay the costs, did not try the indictment, and died within a few weeks. The prosecutor obtained a side-bar rule to tax his costs, to be paid by the defendant or his bail:—It was held, that the bail were not liable to pay the prosecutor's costs, because they were only liable where the prosecutor has been convicted, and that, after the granting a rule for a new trial, it could not be said that there had been a conviction within the true meaning of the recognisance; and that neither the defendant's default in paying the costs, nor the judge's order setting aside the notice of trial, did away with the rule for the new trial, or restored the original verdict. And the court held further, that, whether liable or not, the bail ought not to have been mentioned in the side-bar rule for the taxation of costs. *Reg. v. Bowen*, 19 L. J. Q. B. 63.

Where an indictment had been removed by certiorari, and the defendant, being convicted, had become liable to costs, the court refused to discharge the recognisances of the bail to the certiorari until the costs were paid, although the recognisances made no mention of costs, but they stayed the proceedings on the recognisances, with respect to the defendant, on account of his poverty. *Reg. v. Thornton*, 4 Ex. 826; 19 L. J. M. C. 113.

Where an indictment has, under the 5 & 6 Wm. 4, c. 50, s. 95, been directed by justices to be preferred at sessions, and the

(*f*) *Form of Writ.*[1]

(C) *Of the Return.*[2]

PALMER v. FORSYTH, 4 B. & C. 401; 6 D. & R. 497.

The court quashed a return to a certiorari, on the ground that it only set out copies of the proceedings in the inferior court.

On showing cause against a rule for quashing a writ of certiorari and return, and for a *procedendo*, these facts appeared:—An attachment had issued from the Court of Pleas of Berwick against the goods of the defendant; and bail was put in, and a plaint entered at the next court. A writ of certiorari was afterwards issued to the mayor of Berwick. A return was afterwards made to the writ, setting out copies of the attachment, bail-piece, and plaint.

Per Cur. "The bail had no power over his person. The return of the certiorari must be quashed, as a copy of the record, instead of the record itself, has been returned, and a *procedendo* must be issued."

(D) *Quashing the Writ.*[3]

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indictment cannot be tried there on account of the defendants being a corporation, which cannot appear there by attorney, the prosecutor may remove the indictment into the Queen's Bench by certiorari, without entering into a recognisance for costs, the 5th section of the 16 & 17 Vic. c. 30, applying only to cases where the prosecutor has an option to remove or not. *Reg. v. Mayor, &c. of Manchester*, 26 L. J. M. C. 65.

[1] *Form of* Certiorari *to Justices of Quarter Sessions.*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c.

To the keepers of our peace, and to the justices assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within our county G., and to every one of them greeting.

We being willing, for certain reasons, that all and singular indictments of whatsoever trespasses, contempts, and assaults, whereof J. M. is indicted before you (as it is said), be determined before us, and not elsewhere, do command you and every of you that you, or one of you, do send under your seals, or the seal of one of you, before us at Westminster, immediately after the receipt of the said writ, all and singular the said indictments, with all things touching the same, by whatsoever name the said J. M. is called in the same, together with this our writ, that we may further cause to be done therein what of right and according to the custom of England we shall see fit to be done.

Witness, &c.

At the instance of the prosecutor [*or* defendant]. By rule of court.

[2] The return of a certiorari must return the record itself, and not set it out according to its tenor. *Askew v. Hayton*, 1 Dowl. 510. *See* 1 B. & C. 512. Where one inhabitant of a parish has removed an indictment against it for the non-repair of a road into the Queen's Bench, and has given the usual security for costs, in case a verdict of guilty should pass, the other inhabitants of the parish will not be permitted to plead guilty to the indictment. *Rex v. the Inhabitants of Luxborough*, 1 Dowl. 527.

A return to a certiorari, not describing the justices as justices, or bearing their seals, was ordered to be amended. *Rex v. Kenyon*, 6 B. & C. 640; 9 D. & R. 694.

Where a rule *nisi* for an attachment against a clerk of assize for not returning a certiorari has been discharged on the ground that it was not shown by the affidavit in support of the application that the clerk was a commissioner of oyer and terminer, the court will not grant another rule for an attachment in respect of the same default, or a rule requiring the clerk to return the same writ of certiorari. *Reg. v. Harland*, 8 Dowl. 323.

[3] If a plaintiff, without improper motives, has removed a judgment into a superior court by an irregular writ of certiorari, issued without leave of the court, such amendments will be allowed and such terms imposed as will enable him to avail himself of the judgment, without prejudice to the defendant. *Rowell v. Breedon*, 3 Dowl. 324. The court will not quash a writ of certiorari unless there is an admission, or something tantamount to it, by the party suing it out, that he has done so for the purpose of delay. *Landens v. Sheil*, id. 90.

Where a defendant, who has improperly sued out a certiorari, instead of a *re. fa. lo.*, or *pone*, seeks to quash his writ, no step having been taken on it, the rule is absolute for that purpose in the first instance. *Ruffman v. Thornwell*, 7 Dowl. 613.

Where a certiorari has been obtained vexatiously the court will quash it, but cannot award the consequent costs to which the opposite party has been put in the inferior court, whether the complaining party is prosecutor (*Rex v. Higgins*, 5 Ad. & E. 554; 1 Nev. & P. 50. *See* Comb. 225; 8 East, 260; 1 Ad. & E. 475) or defendant. *Rex v. Pasman and others*, T. T.

Where an indictment on the 7 & 8 Geo. 4, c. 36, s. 16, is removed by certiorari into the Queen's Bench, and is tried on a record issuing out of that court, the expenses of prosecution cannot be allowed under the 7 Geo. 4, c. 64, s. 22. *Rex v. Kelsey*, 1 Dowl. 481.

A rule called on the prosecutor of a certiorari, issued to remove an order of sessions,

(E) *Costs.*[1]

CESSIO Bonorum. A term in the Scottish law for a process applicable to small bankruptcies, where the debtor applies for protection for imprisonment on giving up his property to his creditors. Paters. Comp. 496. See *Jones v. Anstruther*, 18 L. J. Ex. 131; and 5 D. & L. 72; stat. 2 & 3 Vic. c. 41, s. 18.

CESTUI que Trust.[2]

CESTUI que Vie. Where the owner of an estate for his own life disposes thereof, the new owner becomes entitled to an estate for the life of the former. This in the Norman French is called an estate *pur autre vie*, and the person for whose life the land is holden is called the *cestui que vie*. Wms. *Real. Pro.* 20.

CHALLENGE of Jurors. *See* Jury.

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confirming, without appeal, an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a foot-path, to show cause why it should not be quashed, the recognisances required by 5 Geo. 2, c. 19, s. 2, not having been entered into previous to the writ being issued, although they were entered into after the allowance:—*Held*, that the statute only applied to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal; 2dly, that the application should have been to quash the *allowance*, and not the writ itself; and the court refused to mould the rule so as to quash the allowance. *Reg. v. Stephen Jones*, 9 Dowl. 504.

A judge at chambers has jurisdiction to make an order for the issuing of a writ of *procedendo* to send back proceedings removed by certiorari from an inferior court, and it is a matter for the discretion of the judge whether or not a summons to show cause should not in the first instance be granted. *Reg. v Scaife*, 21 L. J. M. C. 221; 17 Jur. 232.

[1] The general practice is that costs are not given to a party showing cause in the first instance. But the court will grant them to the poor-law commissioners in such a case if proper grounds appear for it. *Reg. v. Poor-Law Commissioners*, 9 Q. B. 291.

Where upon a case reserved at the sessions points are raised in favour of both sides, and the court confirms the order of sessions, and decides against all the points raised, neither party is entitled to costs. *Reg. v. Southampton Dock Co.* 20 L. J. M. C. 228.

If the defendant is convicted the recognisance is forfeited, and his sureties are liable to the prosecutor for the costs incurred subsequent to the removal of the indictment. 16 & 17 Vic. c. 30, s. 4. Previously to this statute the prosecutor was entitled to such costs only in case he were a party grieved or a public officer prosecuting for an act which it concerned him as such to prosecute. 5 Wm. and Mary, c. 11. But the omission from the 16 & 17 Vic. c. 3, prescribing the form of the condition of any words restricting the title to costs to prosecutors answering such character appears to abolish this distinction. *See* Gray on Costs, 456; Marshall on Costs, 529. As there may, however, be a doubt upon this point, the reader is referred to the following cases, in which the courts have placed a construction on the words of the 5 Wm. and Mary, c. 11, "a party grieved." *Reg. v. Williams*, 6 Q. B. 273. *Reg. v. Wilson*, 1 E. & B. 597. *Reg. v. Dobson*, 9 Q. B. 302. *Rex v. Cook*, 1 M. & R. 526. If the certiorari has been obtained by the prosecutor, his bail are liable on the acquittal of the defendant. 16 & 17 Vic. c. 30, s. 4.

The costs are taxed according to the course of the Court of Queen's Bench (16 & 17 Vic. c. 30, s. 6. *Reg. v. Inhabitants of Eardisland*, 3 E. & B. 960), the taxing-officer considering such costs as were subsequent to the certiorari. *Reg. v. Summers*, 1 Salk. 55. *Rex v. Passman*, 1 Ad. & E. 603, *Jones v. Davies*, 1 B. & C. 143. They are not limited by the recognisance. *Rex v. Teal*, 13 East, 4. The costs of conveying the defendant to gaol in execution of his sentence have been allowed. *Rex v. Gilbie*, 5 M. & S. 521. If the prosecutor has received the amount of a fine imposed on the defendant, it ought, it seems, to be deducted out of the sum allowed for costs. *Rex v. Osborne*, 4 Burr. 2125. If there are several counts in the indictment, the prosecutor ought not to be allowed the costs exclusively applicable to any one on which the defendant may be acquitted. *Reg. v. Hawdon*, 11 Ad. & E. 143.

[2] A *cestui que trust* is the beneficial owner of property vested in trustees to his use. His interest is called an equitable estate: it is an estate to which he is entitled only in contemplation of the Court of Chancery, which administers equity. *See* Lewin on Trustees. The estate vested in the trustee is called the legal estate; and it is an estate to which the trustee is entitled only in the contemplation of a court of law as distinguished from equity. The action upon a contract under seal, whether such contract be a deed *inter partes* or a deed poll, must be brought by the party with whom the contract was in terms made, and not by the person on whose behalf or for whose benefit it has been made. If a man by deed covenants to pay a sum of money to A. to the use of B., or for the benefit of B., B. cannot maintain an action upon the instrument. Neither, if a

CHALLENGE to Fight.[1]

CHAMBERS, Judge's.

(A) *Jurisdiction of Judge at.*[2]

(B) *Appeal from Decision of Judge at.*[3]

A judge at chambers may transact business relating to a suit in either of the courts.

By the 1 & 2 Vic. c. 45, s. 1, every judge of the superior courts is authorised "to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge relating to any suit or proceeding in either of the said courts, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her Majesty, or relating to any other matter or thing usually transacted out of court, although the said courts have no jurisdiction therein, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs." [4]

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covenant be made to three persons to pay money to them to the use of a fourth, can the fourth person sue upon the deed. The courts of law recognise no other interest than that of the party with whom the contract is expressed to be made, and they give, consequently, no legal force or effect whatever, by way of contract, to the words "to the use" or "for the benefit." Add. on Contr. 939, 4th ed. *Offly v. Ward*, 1 Lev. 23. *Barford v. Stuckey*, 5 Moore, 23; 2 B. & B. 333. But in some instances, where the right of action is vested in one person for the benefit of another, the law will, on the person beneficially interested undertaking to indemnify the other against the costs of the action, permit him to maintain an action in the name of the party with whom the contract was made. *Lamb v. Vice*, 6 Mee. & W. 472.

[1] Challenges to fight duels, and provocation with intent to induce another party to send a challenge, may be prosecuted as misdemeanors by indictment, or by motion to the Court of Queen's Bench for a criminal information, where the case is fit for the interference of that higher tribunal. *R. v. Rice*, 3 East, 581. *R. v. Hankey*, 1 Burr. 316. *R. v. Phillips*, 6 East, 464. *R. v. Williams*, 2 Camp. 506. Burns' *Just.* Duel. However great the provocation may have been it does not excuse the act of the defendant, although it may weigh with the court in mitigating his punishment. *R. v. Rice*, 3 East, 581.

[2] The jurisdiction of a judge at chambers is conferred partly by statute and partly by an immemorial usage, the origin of which is obscure. *R. v. Almon*, Wilmot's Notes, 263. Where an authority is given by statute to the courts, it is presumed to include the ordinary delegated power exercised by a judge at chambers, unless the terms of the statute clearly exclude the notion that a single judge was to exercise the power conferred. *Smecton v. Collier*, 5 D. & L. 189. *Clarke v. East India Co.* 18 L. J. Q. B. 23. *Wearing v. Smith*, 16 id. 1. The judge at chambers does not constitute a court of record, and he cannot commit for contempt. He has no power to rescind or modify a rule which has been made by the full court after argument, unless with consent of parties (*Josephs v. Perry*, 3 Dowl. 699); but he may do so as to rules of course; and he may set aside a rule to change the venue obtained on the common affidavit. *Darrington v. Price*, 6 C. B. 309. An application cannot be made at chambers against an attorney unless there is a cause in court. *Kirby v. Ellison*, 2 Dowl. 219.

It has been held that no action lies for disobedience of a judge's order, whether it was made by consent or not. *Hookpayton v. Bussell*, 23 L. J. Ex. 267; id. 267.

[3] The court *in banc* has in general a controlling power over the orders of a judge at chambers, and may set such orders aside; but it will not, as a matter of course, review the decision of the judge at chambers, particularly in a matter where he had a discretion, and has exercised it. *R. v. Archbishop of York*, 1 Ad. & E. 394. A judge sitting in the Bail Court possesses the same power of review as that which the full court has. *R. v. Myers*, 5 Dowl. 686. The party dissatisfied with the decision of a judge at chambers must, however, satisfy the court *in banc* that what he complains of is not the mode of carrying out the order, but the mode in which the judge exercised his discretion; for if the order has not been properly carried out, the party should apply to the same judge to enforce it in the proper way. *Rennie v. Beresford*, 3 D. & L. 468: *per Alderson, B.* And where a party applies to rescind the order of a judge at chambers, he should make all his applications at once, and not come again and again. *Thompson v. Langridge*, 5 D. & L. 213. Application may also be made to a judge at chambers to rescind his own order; but if the party fails on such an application, he cannot apply to the court on the self-same point. *Re Stretton*, 15 L. J. Ex. 16.

[4] *See* also 11 Geo. 4, and 1 Wm. 4, c. 70, s. 7. The increase of jurisdiction conferred

CHAMPERTY.[1]

SIMPSON v. LAMB, 7 E. & B. 84; 28 L. J. Q. B. 32.

An attorney cannot purchase the subject-matter of the suit from his client.[2]

An attorney conducting a cause for the plaintiff, though not the attorney on the record, after verdict and before judgment *bonâ fide* purchased from his client the benefit of his verdict, and gave notice of this to the defendant.

Lord Campbell, C. J. "It appears to us, for the purpose of the question before us, S. is to be considered as the attorney having the management of the cause for the plaintiffs, and that the purchase was in effect a purchase by the attorney in the cause of the subject-matter of it *pendente lite*, not for the purpose of enabling them to carry on their suit, but because they wanted the money. Independently of the statutes referred to upon the agreement restraining the purchase of property in suit, particularly by persons concerned in the administration of justice (1st Stat. of Westminster, c. 49, and 3d stat. 28 Edw. I. c. 11, commented upon in the 2d Institute, 484), it has been held in several cases, that no attorney can be permitted to purchase anything in litigation, of which litigation he has the management (*Hall v. Hallett*, 1 Cox, 134. *Wood v. Downs*, 18 Ves. 120, and the authorities therein cited), and considering the relation in which the attorney and client stand to each other, it would seem, as was said in *Hall v. Hallett*, to be against the policy of the law to permit such a dealing by an attorney with the subject of a suit, of which he has the conduct as the attorney whilst the case is still undetermined by judgment, as that which is now in question before us, whatever might have been the case if the purchase had been by a stranger."[3]

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by the C. L. P. Acts has also materially enlarged the business at judges' chambers.

During term one of the judges of each of the three courts attends at chambers in Serjeants' Inn, Chancery Lane, for the purpose of disposing of all applications incidental to the actions pending in their respective courts, and a few other matters. Throughout the vacation, also, one or more of the judges is daily, or several times a week, in attendance for that purpose; and while the fourteen judges are absent on circuit, the other always remains in town for this purpose.

The hours of attendance of the judge at chambers is from three to five o'clock during term, and from ten to one o'clock during vacation. He generally disposes, however, each day of all the business standing.

[1] Champerty (*campi partitia*, a division of the field), is properly a bargain between a plaintiff or defendant in a cause and another person who has no interest in the subject in dispute, to divide the land or other property sued for between them, if they prevail at law, in consideration of the other person carrying on the suit at his own expense. Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. Sm. Law of R. & P. P. 693.

[2] See *Sprye v. Porter*, 7 E. & B. 58.

[3] But where, after verdict and before judgment, a plaintiff in ejectment assigned the subject-matter of the suit to his attorney, as a security for money advanced by the attorney for the purpose of carrying on the suit and other objects, and for the amount due to him for his professional services, the court held that the assignment *to the attorney* was not void by reason of the statutes against maintenance and champerty, or as being against public policy, since it was not an absolute sale of the subject-matter of the ejectment, but only a security for past advances. *Anderson v. Radcliffe*, 29 L. J. Q. B. 128, Ex. Ch.

It is laid down in the old books that, for avoiding maintenance, rights of action cannot be assigned or granted over by one man to another. "If a man owe me money on an obligation or the like, I cannot grant this debt to another: but I may grant a letter of attorney to another man to sue for it, and receive it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor."—Vin. Abr. Assignment, B.; Co. Litt. 265, a.

See a definition of champerty, *Strange v. Brennan*, Ch. 10 Jur. 649, and *per Best, C. J.*, *Williams v. Protheroe*, 3 You. & J. 135; and *Tindale, C. J.*, *Stanley v. Jones*, 5 M. & P. 193; 7 Bing. 369.

This is an offence of a public nature, and all contracts which have this offence within their object or operation are invalid.

In *Stanley v. Jones* (7 Bing. 369; 5 M. & P. 193) it appeared that by articles of agreement T. S. covenanted to communicate to the defendant all such information as he, T. S., possessed or could procure, and to use and exert his utmost influence and means of procuring such evidence as should be requisite to substantiate the defendant's claims against R. M. and W. S. E., in consideration of which the defendant covenanted to pay T. S. one eighth part or share of such sum as should at any time be recovered or ob-

CHANCE-MEDLEY. A casual affray. Also *Chaud Medley*, in the heat of blood; used indifferently for the killing of another in self-defence on a sudden encounter. 4 Com. 183; 3 Inst. 55–7.

CHANCERY. *See* Admission, vol. i. p. 199; Answers in Chancery, id. p. 373.

(A) *Decree in, how Proved.*[1]

(B) *Orders of Court of, how Proved.*[2]

(C) *Depositions in.*[3]

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tained, either by suit at law or in equity, from R. M. and W. S. E. It was held that the agreement was illegal, as it amounted to champerty; so, an agreement by an attorney, to save a party harmless from costs, on his being allowed to retain the half of whatever sums were recovered, was held to amount to maintenance. *Re Masters*, 4 Dowl. 18. And if the purchaser of an interest which is the subject of a suit agrees to indemnify the seller against all the costs which have been, or which may be, incurred by him in the prosecution of the suit, this amounts to maintenance. *Harrington v. Long*, 2 Mylne & K. 590.

But it is not maintenance where a party agrees to promote a suit touching a matter in which he has reasonable ground to believe that he has an interest (*Sinclair v. Parker*, 11 Mee. & W. 675. *White v. Gardner*, 1 You. & C. 385). And where, by articles of agreement between the vendor and the purchaser of an estate, it was agreed that the purchaser, bearing the expense of certain suits commenced by the vendor against an occupier for bygone rent, should have the rent so to be recovered, and also any sum that could be recovered for dilapidations, and that the purchaser, at his expense, might use the name of the vendor in any action he thought fit to commence against the occupier, for arrears of rent or dilapidations, it was held that the agreement was not void as amounting to champerty. *Williams v. Protheroe*, 3 Y. & J. 129; 5 Bing. 309.

[1] If a decree in Chancery is offered merely to prove that it was in fact made, the bill, &c. need not be proved, but if a party intend to avail himself of a decree, as an adjudication upon the subject-matter, and not merely to prove collaterally that the decree was made, he must generally prove not only the decree but the bill and answer upon which it was founded; because without such proof it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it. *Leak v. Marquis of Westmeath*, 2 M. & Rob. 397. *Blower v. Hollis*, 1 C. & M. 396. *Attwood v. Taylor*, 1 Man. & G. 289. But if the bill and answer are fully recited in the decree, the necessity for so doing does not exist, and the production of the decree alone will be sufficient. *Wheeler v. Lowth*, Com. Dig. Evidence, c. 1. *Wharton v. Peer*, 12 Clark & Fin. 301. And in neither case is it necessary that the depositions referred to in the record should be produced. *Layburn v. Crisp*, 4 Mee. & W. 320.

[2] A document delivered out by a registrar of the Court of Chancery, as an order of that court, need not be compared with any book of the orders of the court, but will be regarded in the light of an original. *Mayor of Ludlow v. Charlton*, 9 C. & P. 242.

[3] Depositions in Chancery cannot in general be read without proof of the bill and answer, in order to show that a cause was depending, as well as who were the parties and what was the subject-matter in issue; for, if no cause were depending, the depositions are but voluntary affidavits, and if there were one the depositions cannot be read unless the cause was against the same parties or those claiming in privity with them. 2 Tayl. Ev. 1261, 3d ed. *Layburn v. Crisp*, 4 Mee. & W. 326. *Blower v. Hollis*, 1 C. & M. 396. *Nightingale v. Devisme*, 5 Burr. 2589. And depositions may be read on proof of the bill alone, if the defendant is in contempt for not putting in an answer, and had an opportunity of cross-examining the witnesses. *Carrington v. Cornock*, 2 Sim. 567. *Cazenove v. Vaughan*, 1 M. & S. 4. The bill and answer when so put in do not become evidence in the cause, so that the opposite counsel has no right to read or refer to them in his address. They are put in merely that the judge, by looking at them, may see what was in issue in the suit. *Chappell v. Purday*, 14 Mee. & W. 303. And no proof of the bill or answer is necessary if the depositions are used merely for the purpose of contradicting the deponent as a witness, or is introduced merely as an admission. *Highfield v. Peak*, M. & M. 109. Neither is it necessary, where the depositions are read upon the trial of an issue pursuant to an order of the Court of Chancery directing that such depositions shall be so read. *Palmer v. Lord Aylesbury*, 15 Ves. 175. *Corbett v. Corbett*, 1 Ves. & B. 336. In order to be valid, it is necessary that the depositions should be written throughout by the examiner himself (*Stobbart v. Todd*, 23 L. J. Ch. 956); and authenticated by his signature, and they must also be transmitted by him to the record-office of the Court of Chancery, to be there filed. (15 & 16 Vic. c. 86, s. 34.) Proof must therefore be given that these regulations have been complied with if the admissibility of the depositions is disputed. The original documents, however, need not be produced: it will be sufficient to put in evidence either examined copies of them, or copies certified as true copies, by the officer who has custody of the originals. *See* 2 Tayl. Evid. 1263; 15 & 16 Vic. c. 86, s. 34; 14 & 15 Vic. c. 99, s. 14. *Reeve v. Hodson*, 10 Hare, App. xix.: *per Wood, V.C.*

(D) *Statements in Bill not Admissions.*[1]

CHANGING of Attorney.

See vol. ii. p. 39.

CHAPEL.

See Church and Chapel.

CHARACTER.

I. Evidence as to, when Admitted.[2]

(A) *With respect to Parties.*[3]
(B) „ *Witnesses.*[4]
(C) *Evidence of Character of a Witness.*
(*a*) *May be asked whether he has been Guilty of a Felony or Misdemeanor.*

Witness may be asked whether he has been guilty of a felony or misdemeanor: upon his denial or refusal the conviction may be proven.

By the 17 & 18 Vic. c. 125,[5] "a witness in any cause may be questioned as to whether he has been guilty of any felony or misdemeanor, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the

[1] A bill in Chancery is not admissible against the plaintiff in proof of the admissions it contains; the facts so stated being regarded as the mere suggestions of counsel. *Boileau v. Ruther*, 2 Ex. R. 665. *Doe v. Tybourn*, 7 T. R. 3.

[2] It is not, according to the general rule, competent to give evidence of the general character of parties, with a view of raising a presumption either favourable to one party or disadvantageous to his antagonist (see *King v. Francis*, 3 Esp. 117: *per Lord Kenyon*); but where the very nature of the proceedings is to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it. Best, Ev. 345. Thus, in actions for seduction, the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct or proof of particular acts of it. *Bamfield v. Massey*, 1 Camp. 460. *Dodd v. Norris*, 3 id. 519. *Verry v. Watkins*, 7 Car. & P. 308. And where the issue is, whether a party is *non compos mentis*, proof may be adduced of particular acts of insanity. *Clark v. Periam*, 2 Atk. 340. On an indictment for keeping a common bawdy-house or common gaming-house, or for being a common brawler, the prosecutor may give in evidence any acts of the defendant which support the general charge. 2 Stark. Ev. 304, 3d ed. *Clark v. Periam, supra.*

[3] Whenever it is allowable to impeach the character of a party by evidence, it is competent to the other side to give evidence to contradict the evidence thus adduced. *R. v. Murphy*, 19 How. St. T. 724; Bull. N. P. 296. *Dodd v. Norris*, 3 Camp. 519. *Bamfield v. Massey*, 1 id. 460. *R. v. Clarke*, 2 Stark. 241. And where the defendant in a criminal prosecution sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony. Best, Ev. 347, 3d ed.; 2 Stark. Ev. 304, 3d ed.; Bull. N. P. 296. *R. v. Wood*, 5 Jur. 225: but see *Reg. v. Burt*, 5 Cox, Cr. C. 284.

By the 14 & 15 Vic. c. 19, s. 9, "if, upon the trial of any person for a subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for a previous offence or offences." This enactment applies whether the evidence to character is given by witnesses called by the accused, or is extracted by cross-examination from witnesses called for the prosecution. *R. v. Shrimpton*, 3 Car. & P. 373; 2 Dears. C. C. 319.

[4] In criminal cases, the prisoner is allowed to call witnesses to speak generally as to his character, but not to give evidence as to particular acts, unless such evidence tends directly to the disproof of some of the facts put in issue by the pleadings. Arch. Cr. L. by Welsby, 188, 13th ed. And, upon an indictment for rape, the defendant may give general evidence of the woman's character for want of chastity; or he may prove that she had before been criminally connected with him (*R. v. Aspinall*, 2 Stark. Ev. 700. *R. v. Martin*, 6 Car. & P. 562); but not, it seems, that she had been criminally connected with others. *R. v. Hodgson*, R. & R. 2: *sed quære?* See *R. v. Martin, supra.* It is the same upon an indictment for an assault with intent to commit a rape. *R. v. Clarke*, 1 Stark. 243. *R. v. Martin, supra.*

[5] The above statute constitutes an exception to the general rule that a collateral issue, as to the character of a witness, cannot be raised on the trial of a cause. For, although it is true that the credibility of a witness is always in issue, and accordingly general evidence is receivable to show that the character and reputation which he bears are such that he is unworthy to be believed, even when upon his oath. But evidence of particular facts or particular transactions cannot be received for this purpose. 13 How. St. Tr. 211; Sid. 246; 32 id. 490; Bull. N. P. 296. Best, Ev. 350. *R. v. Burke*, 8 Cox, Cr. C. 44. The witness may, indeed, be questioned as to such facts or transactions, but he is not always bound to answer, and cannot call evidence to contradict it. Best, Ev. 350.

substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, &c., shall, upon proof of the identity of the person, be sufficient evidence of the conviction, without proof of the signature or official character of the person appearing to have signed the name."

CHARGING Order. *See* Judgment and Attachment of Defendants, vol. i. p. 579.

CHARITABLE Uses.

Settlement of Lands to a Charitable Use must be by Deed executed Twelve Months before Grantor's Death, and Enrolled; or if Stock, must be Transferred to the Use in the Books.

Settlement of lands to a charitable use must be by deed, executed twelve months before grantor's death and enrolled; or, if of stock, must be transferred to the use in the books.

9 Geo. 2, c. 36. "No manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise,[1] for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever in trust, or for the benefit of any charitable uses whatsoever,[2] unless such gift, &c. of any such lands, &c. (other than stocks in the public funds), be and be made by deed, indented, sealed, and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor or grantor, including the days of the execution and death, and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."[3] *See* 9 Geo. 4, c. 85.

[1] The fourth section provides that the act shall not be construed to extend to the two universities of England and their colleges, or the scholars upon the foundation of the colleges of Eton, Winchester, or Westminster, with a proviso in sect. 5, that no college shall be at liberty to purchase, acquire, receive, take, or hold more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations; but this part of the statute is repealed by the 45 Geo. 3, c. 101. By sect. 6, nothing in this act contained shall extend or be construed to extend to the disposition, grant, or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland."

The legislature meant to except such devisees only as were really and *bonâ fide* for the benefit of the colleges, and not those in which the legal interest only passes to the college in trust for other charitable purposes. *Att.-Gen. v. Tancred*, 1 Eden.; 15 Amb. 351; 1 W. Bl. 90. *Att.-Gen. v. Manby*, 1 Mer. 327. *Att.-Gen. v. Whorwood*, 1 Ves. sen. 537.

Legacies to be laid out in land in Scotland, or in heritable securities there, have been held to be within this provision of the act. *Oliphant v. Hendrie*, 1 Bro. C. C. 570. *Mackintosh v. Townsend*, 16 Ves. 330. It has also been held that, as the statute is local, it does not extend to prohibit dispositions of real estate or personal property connected with real estate in Ireland. *Campbell v. Lord Radnor*, 1 Bro. C. C. 272), or in the West Indies or other colonies. *Attorney-General v. Steuart*, 2 Mer. 143. *Mayor of Lyons v. East India Co.* 1 Moo. P. C. 175. *Mitford v. Reynolds*, 1 Phil. C. C. 185. But a bequest of personal estate connected with real estate in England, to be laid out in land in Scotland for a charitable use, is within the statute. *Curtis v. Hutton*, 14 Ves. 527. *Attorney-General v. Mill*, 3 Russ. 328; 5 Bligh. N. C. 592.

[2] The second section provides that such limitations, &c. shall not be construed to extend to any purchase or transfer made for valuable consideration.

[3] Sect. 3 enacts "that all gifts, grants, conveyances, appointments, assurances, transfers, settlements whatsoever of any lands,

tenements, or other hereditaments, or of any estate or interest therein, or of charge or incumbrance affecting or to affect any lands, &c. to or in trust for any charitable use whatsoever, which shall at any time from and after, &c. made in any other form or manner than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

A gift or bequest of money or other purely personal estate is not within the act. See *Soresby v. Hollins*, Highm. 174: *per Lord Hardwicke*. A devise of copyhold estate is within the prohibition. *Arnold v. Chapman*, 1 Ves. sen. 108. *Doe v. Waterlow*, 3 B. & A. 149. So are bequests in any manner affecting or relating to real property. See *Harrison v. Harrison*, 1 Russ. & Mylne, 71. As of money charged on real estate (*Arnold v. Chapman*, 1 Ves. sen. 108. See *Attorney-General v. Harley*, 5 Mad. 321), or to arise from the sale of real estate (*Attorney-General v. Weymouth*, Amb. 20. *Waite v. Webb*, Mad. & Geld. 71); bequests of terms for years (*Attorney-General v. Graves*, Amb. 155. *Attorney-General v. Tomkins*, id. 216. *Johnston v. Swann*, 3 Madd. 457. See 3 id. 457), or of money due on mortgage (*Attorney-General v. Meyrick*, 2 Ves. sen. 44. *Attorney-General v. Caldwell*, Amb. 635. *White v. Evans*, 4 Ves. 21. *Johnston v. Swann*, 3 Madd. 457); or secured on turnpike-tolls (*Knapp v. Williams*, 4 Ves. 30, n.); or secured on the poor or county rates (*Finch v. Squire*, id. 41); or a judgment-debt affecting the real estate of the debtor. *Colluson v. Pater*, 2 Russ. & Mylne, 344. These are within the statute, and void.

A bequest of money, provided the legatee will furnish land for charitable purposes, is void. *Attorney-General v. Davis*, 9 Ves. 535. *Attorney-General v. Hull*, 9 Hare, 647. *Langstaff v. Rennison*, 1 Drewr. 28. *Dunn v. Bownes*, 1 Ray & J. 596. So if a testator give real estate to A., he paying a sum of money to the executors, who are to apply the residue of the real and personal estate to a charity, although the land is well charged, the bequest is void, and the money will result to the heir. *Arnold v. Chapman*, 1 Ves. sen. 108. *Poor v. Mial*, Mad. & G. 32.

Policies of assurance, by which the directors engage to pay "out of the funds," or that "the funds shall be liable," or that a share of the funds shall be paid, are not so connected with land as to fall within the act, notwithstanding the assets of the assurance company may consist partly of real estate, and the assured may, by the terms of the policy, become a member. *Marsh v. Attorney-General*, 5 Beav. 433. And it has been held that shares in the London Gaslight and Coke Company are not within the statute. *Thompson v. Thompson*, 1 Coll. 381. And, in general, shares in joint-stock companies do not fall within the statute. *Ashton v. Langdale*, 4 De Gex & Sm. 402. *In re Langham*, 10 Hare, 446. *Edwards v. Hall*, 19 Jur. 1189. *Myers v. Perigal*, 11 C. B. 90; 2 De Gex, M. & G. 599.

But where the security confers a direct and primary right or charge on the realty, as where the lands of the company, or the tolls or rates, or other income enjoyed by the company, are assigned or mortgaged, the case is within the statute. *Ashton v. Langdale, supra. Walker v. Milne*, 11 Beav. 507. *Bunting v. Marriott*, 19 id. 163.

The object of the statute being to prevent any addition to the quantity of land already in mortmain, a bequest of money to be applied simply in the amelioration of lands in mortmain, or for building upon them, or repairing buildings already erected, is not within its provisions. *Harris v. Barnes*, Amb. 651. *Ingleby v. Dobson*, 4 Russ. C. C. 342. *Glubb v. Attorney-General*, Amb. 373. *Attorney-General v. Bishop of Chester*, 1 Bro. C. C. 444. *Brodie v. Chandos*, id. 444, n. *Foy v. Foy*, 1 Cox, 165. *Attorney-General v. Munby*, 1 Mer. 327. *Attorney-General v. Parsons*, 8 Ves. 186. *Shaw v. Peckthall*, Danielli, R. 92. But in order to make such a bequest valid, if the testator direct the erection of a school or other building, he must point out the land in mortmain on which the erection is to take place. *Giblett v. Hobson*, 5 Sim. 651; 3 Mylne & K. 517. *Attorney-General v. Hyde*, Amb. 751. *Pritchard v. Arbuin*, 3 Russ. C. C. 456. *Attorney-General v. Davies*, 9 Ves. 544. *Attorney-General v. Nash*, 3 Bro. C. C. 588. *Attorney-General v. Hodyson*, 15 Sim. 146; overruling *Attorney-General v. Bowles*, 2 Ves. sen. 547. But although it has been settled that if a testator gives personal property to erect and endow a school or hospital, it must be considered, unless it be otherwise expressed, that it was his intention that land should be acquired and buildings made as necessary parts of his purpose; yet if he expressly directs that no part of the money bequeathed is to be so applied, the bequest may be good. *Attorney-General v. Williams*, 2 Cox, 387; 4 Bro. C. C. 526. *Dixon v. Butler*, 3 You. & C. 677. *Mather v. Scott*, 2 Keen, 172. Thus, where the testator, after reciting his wish and intention that a blue-coat school should be created at Oldham, and a blind asylum at Manchester, under the management and direction of trustees appointed by his will, bequeathed 20*l.* in trust for the said trustees for each of the said charities, and directed that the said money should not be applied in the purchase of lands or the erection of buildings, because it was his expectation that other persons would, at their expense, purchase lands and buildings for those purposes, it was held that the bequest was not void. *Henshaw v. Atkinson*, 3 Madd. 306.

The statute does not apply to a devise by a freeman of the city of London of land within the city; for, by the custom of London, freemen may devise in mortmain lands within the city. *Middleton v. Cator*, 4 Bro. C. C. 409; Bac. Abr. Customs of London, A.

With respect to what are charitable uses within the statute, the 43 Eliz. c. 4, enumerates the following as charitable uses; namely, — gifts for relief of aged, impotent, and poor people; for maintenance of sick

and maimed soldiers and mariners; for ease of poor inhabitants concerning payment of taxes; for aid of young tradesmen, handicraftsmen, and persons decayed; for relief, stock, and maintenance of houses of correction; for marriages of poor maids; for education and preferment of orphans; for schools of learning, free schools, and scholars in universities; for relief or redemption of prisoners or captives; for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. These and bequests of a similar nature are within the statute of mortmain. See *Turner v. Ogden*, 1 Cox, 317. A bequest for the education of the poor by means of schools (*Attorney-General v. Hyde*, Amb. 750. *Attorney-General v. Nash*, 3 Bro. C. C. 588), for their relief by hospitals (*Masters v. Masters*, 1 P. Wms. 420. *Pelham v. Anderson*, 2 Eden, 296; 1 Bro. C. C. 444. *Foy v. Foy*, 1 Cox, 163), are within it. The following have been held to be bequests to charitable uses within the statute of mortmain: — A bequest to the poor inhabitants not receiving alms of a particular parish (*Attorney-General v. Clarke*, Amb. 422); to the widows and children of seamen of a particular place (*Powell v. Attorney-General*, 3 Mer. 48. *Attorney-General v. Comber*, 2 Sim. & Stu. 93); a bequest to a public purpose, whether local or general, as to the British Museum (*British Museum v. White*, 1 Sim. & Stu. 694); for the improvement of a particular city (*Howse v. Chapman*, 4 Ves. 542. *Mitford v. Reynolds*, 1 Phil. C. C. 185); for the establishment of water-works for the use of inhabitants of a particular town (*Jones v. Williams*, Amb. 651. *Attorney-General v. Heelis*, 2 Sim. & Stu. 67); for a public botanical garden (*Townley v. Bedwell*, 6 Ves. 194); a bequest for the promotion of the Protestant faith, as for the establishment of a preacher in a particular chapel (*Grieves v. Case*, 4 Bro. C. C. 67; 2 Cox, 801; 1 Ves. jun. 548; but see *Doe v. Aldridge*, 4 T. R. 264. *Doe v. Copestake*, 6 East, 328); for the benefit of poor Dissenting ministers in England (*Waller v. Childs*, Amb. 524. *Attorney-General v. Fowler*, 15 Ves. 85); an annual sum to keep the chimes of a particular parish in repair (*Turner v. Ogden*, 1 Cox, 316); or to build an organ-gallery in a parish church (*Adam v. Cole*, 6 Beav. 353); to a vicar or curate for preaching an annual sermon on a particular day (*Soresby v. Hollins*, Highm. 174; 9 Mod. 221. *Durour v. Motteaux*, 1 Ves. jun. 320); to be paid on a certain day to the singers sitting in the gallery of the church (*Turner v. Ogden, supra*); a bequest for the advancement of the Christian religion among infidels. *Attorney-General v. Virginia College*, 1 Ves. jun. 243. These are deemed bequests to charitable uses within the mortmain act.

But a devise or bequest to Queen Anne's Bounty is not; it is rendered valid by 43 Geo. 3, c. 107. And by the 43 Geo. 3, c. 108, bequests for building churches are taken out of the operation of the statute. This act provides that all persons may by will, executed for three months, at least, before death, bequeath all their estate in real property not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for the erecting, rebuilding, repairing, purchasing, or providing any church or chapel, where the Liturgy of the Church of England shall be used, or any mansion-house for the residence of any minister of the Church of England officiating in such church or chapel, or any outbuildings, churchyard, or glebe for the same respectively. *Dixon v. Baker*, 3 You. & C. 677. The act provides that any gift exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition; and that no glebe containing upwards of fifty acres shall be augmented by more than one acre. A bequest of a sum of money to be raised out of real estate, and applied in erecting a monument to the memory of the testator, is not a charitable use (*Mellick v. The Asylum*, 1 Jacob, 180. *Adnam v. Cole*, 6 Beav. 353; see *Mitford v. Reynolds*, 1 Phil. C. C. 185); so a trust to repair, and, if need be, repair the testator's family vault, is not within the statute of mortmain. *Doe v. Pitcher*, 6 Taunt. 359; 2 Marsh. 61; 3 M. & S. 407.

It has been held that a gift to one of the chartered companies in the City of London, for an increase of their stock of corn for the service of the market in London, is a donation for the benefit of the company and its revenues, and not a charitable use. *Attorney-General v. the Haberdashers' Co.* 1 Mylne & K. 420.

In cases where there is a bequest to particular legatees to which the statute does not apply, accompanied by a disposition void by the operation of the statute, if the two objects are not inseparably blended, the bequest in favour of the unobjectionable purpose will be supported, although the charitable disposition shall fail (*Blandford v. Tackerell*, 1 Bro. C. C. 394. *Attorney-General v. Stepney*, 10 Ves. 22. *Doe v. Aldridge*, 4 T. R. 264. *Waite v. Webb*, Madd. & Geld. 71. *Doe v. Pitcher*, 6 Taunt. 359; 2 Marsh. 61. *Doe v. Wright*, 2 B. & A. 710); but if the unobjectionable bequest be so mixed up with the purposes of the charity as to be dependent on it, the bequest must be considered indivisible and void. *Durour v. Motteaux*, 1 Ves. sen. 323. *Attorney-General v. Goulding*, 2 Bro. C. C. 428. *Attorney-General v. Huetman*, 2 J. & W. 270. *Attorney-General v. Davies*, 9 Ves. 535. *Attorney-General v. Whitchurch*, 3 id. 141. *Lambrey v. Gurr*, Mad. & Geld. 151. See also *Mitford v. Reynolds*, 1 Phil. 185. *Morrice v. Bishop of Durham*, 10 Ves. 538.

Further, the statute does not operate in a case where a charitable fund is given to executors or trustees for a charitable purpose, with a *discretionary* power to lay it out in land or otherwise. If the words of the will are mandatory or directory, the bequest is void; but if the words of the will leave sufficient evidence for the court to say that there is a power in the trustees to lay out the money either in land or otherwise, the

CHARITIES, Commissioners of.

Administration of under Charity Commissioners.

In England and Wales, charitable trusts are subject to the control of commissioners appointed for the purpose of carrying out the provisions of certain acts for securing the due administration of charitable trusts, and for the more beneficial application of charitable funds in certain cases. *See* 17 & 18 Vic. c. 137; 18 & 19 id. c. 124; 21 & 22 id. c. 51; 23 & 24 id. c. 136. The word "charity" in these acts includes every institution in England or Wales endowed for charitable purposes, except such as are expressly exempted from their operation. It does not extend to the colleges of Eton and Winchester. Roman Catholic charities are regulated under the same acts, and also under the 23 & 24 Vic. c. 134.[1]

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bequest will be good; on the principle that if the language of a will is in the disjunctive, and leaves to the executors or trustees two methods to do a particular thing, the one lawful and the other prohibited, the lawful bequest shall be pursued, and take effect. *Mann v. Burlingham*, 1 Keen, 235. *Attorney-General v. Hodgson*, 15 Sim. 146. *Soresby v. Hollins*, Highm. 175; 9 Madd. 221. *Grimmett v. Grimmett*, Amb. 212. *Curtis v. Hutton*, 14 Ves. 527. *Attorney-General v. Goddard*, 1 Turn. & Russ. 348. *Johnston v. Swann*, 3 Madd. 457. *Kirkback v. Hudson*, 7 Price, 221. *English v. Ord*, Highm. 181. *Grieves v. Case*, 4 Bro. C. C. 67; 2 Cox, 301; 5 Ves. jun. 548. *Doe v. Wright*, 2 B. & A. 710.

And purposes of liberality and benevolence, or *private* charity, are not "charitable uses" within the statute. Accordingly, a bequest in trust for such objects of "benevolence and liberality" as the trustee in his discretion shall most approve, is not a bequest to a charitable use (*Morice v. Bishop of Durham*, 9 Ves. 399; 10 id. 522); neither is a devise to trustees of a reversion in land to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should think fit to apply the same. *Doe v. Copestake*, 6 East, 328. See *Ommaney v. Butcher*, 1 Turn. & Russ. 260. *James v. Allen*, 3 Mer. 17. *Waldo v. Caley*, 16 Ves. 206. *Down v. Worrall*, 1 Mylne & K. 561. *Horde v. Lord Suffolk*, 2 id. 59. *Ellis v. Selby*, 21 Mylne & C. 286. *Baker v. Sutton*, Keen, 224. *Nightingale v. Goulburn*, 5 Hare, 484. *Townshend v. Carus*, 3 id. 257. *Kendall v. Granger*, 5 Beav. 300. *Vezey v. Jamson*, 1 Sim. & Stu. 71. *Nash v. Morley*, 5 Beav. 177.

Bequests to charitable uses made void by the statute devolve on the testator's heir (*Arnold v. Chapman*, 1 Ves. sen. 108. *Gibbs v. Rumsey*, 2 Ves. & B. 294); or his next of kin (*House v. Chapman*, 4 Ves. 542); or the residuary legatee, according to the nature of the property bequeathed and the language of the will. *Cook v. Stationers' Co.* 3 Mylne & K. 262. *Henchman v. Attorney-General*, id. 485.

[1] Any incorporated charity, or the trustees of any charity, whether incorporated or not, may, with the consent of the board, invest money arising from any sale of land belonging to the charity, or received by way of equality of exchange or partition in the purchase of land, and may hold such land, or any land acquired by way of exchange or partition, for the benefit of such charity, without any license in mortmain. (18 & 19 Vic. c. 124, s. 35.) By the 1st section of the last-mentioned statute it is enacted, that "no existing or future gift or disposition of real or personal estate upon any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion shall be invalidated by reason only that the same estate has been or shall be also subjected to any trust or provision deemed to be superstitious, or otherwise prohibited by the laws affecting persons professing the same religion; but in every such case it shall be lawful for the High Court of Chancery, or any judge thereof sitting at chambers, in exercise of the jurisdiction created by the Charitable Trusts Act, 1853, upon the application of her Majesty's Atttorney-General, or of any person authorised for this purpose, by the certificate of the Board of Charity Commissioners for England and Wales, or for the said board, upon the application of the person or persons acting in the administration of such real or personal estate, or of a majority of such persons, to apportion the same estate, or the annual income or benefit thereof, so that a proportion thereof, to be fixed by such court or judge, or by the said board, as the case may require, may be exclusively subject to the lawful charitable trusts declared by the donor or settler, and that the residue thereof may become subject to such lawful charitable trusts for the benefit of persons professing the Roman Catholic religion, to take effect in lieu of such superstitious or prohibited trusts, as the said court or judge or the said board may consider under the circumstances to be most just; and also that it shall be lawful for the said court or judge or board making any such apportionment by the same, or any other order or orders, to establish any scheme for giving effect thereto, and to appoint trustees for the several portions of such real and personal estate, according to the trusts established, of the same proportions respectively, and to vest the estate to be so apportioned in the same trustees respectively."

CHARTER. *Charta*, paper. Written evidence of a grant or contract. See Bracton, lib. ii. c. 26. Usually applied only to grants from the Crown of exemption or privilege to some corporation or body politic. *See* Corporation; Joint-Stock Companies; Municipal Corporations.

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I. Its Nature, Form, and Qualities.[1]

[1] A charter-party, *carta partitia*, is an agreement by which a shipowner lets an entire ship, or a part of it, to a merchant for the conveyance of goods, binding himself to transport them to a particular place for a sum of money, which the merchant undertakes to pay as freight for their carriage. Maude and P. on Shipping, 204, 2d ed.; Abbott, by Shee, 201.

The charter-party must bear a stamp of five shillings, by virtue of the 5 & 6 Vic. c. 79 (schedule), which imposes the duty on every charter-party, or agreement, or contract for the charter of any ship, and every memorandum, letter, or other writing between the captain, master, or owner of any ship, and any other person for or relating to the freight or conveyance of any money, goods, or effects on board any ship. Similar provisions were enacted for Ireland by 5 & 6 Vic. c. 82, s. 34, which has been continued from time to time. *See* 14 & 15 Vic. c. 18. The stamp may be impressed without the payment of any penalty within fourteen days after the charter-party bears date, and has been executed by the party who first executes it. Within a month from this time it may be stamped, on payment of a penalty of 100*l*. Beyond this period it cannot be stamped.

(5 & 6 Vic. c. 79, s. 21.)

The instrument by which it is recorded, and which though often in a deed is not necessarily so, is generally executed by the owner of the ship, when made at the place of his residence, and sometimes by the master also. Indeed the chartering of a vessel need not be in writing, though it is usually so effected; a verbal agreement acted upon may have the same operation as a charter-party. *Lidgett v. Williams*, 4 Hare, 456. If made abroad, it can, of course, only be executed by the master, unless there be an agent of the owners, and in that case, if a deed, no action of covenant can be maintained on it against the owner, unless the party executing it had an authority by deed to do so (*Harrison v. Jackson*, 7 T. R. 207), though an action on the case may, for the breach of such of the general duties of a shipowner as are not inconsistent with its terms (*Leslie v. Wilson*, 3 B. & B. 171; and see *per Tindal, C. J.*, in *Bushell v. Beavan*, 1 Bing. N. C. 120), and voyage may be made up to a certain period under a charter-party by deed, and afterwards under a parol agreement, or *vice versâ*. *White v. Parkin*, 12 East, 578.

The terms of a charter-party cannot be varied by parol (*Gibbon v. Young*, 2 Moore, 224. *Thompson v. Brown*, 7 Taunt. 656), though it may, like other mercantile instruments, be explained by the usage of trade. *Donaldson v. Forster*, Abb. p. 3, c. 1, s. 17. *Robertson v. Jackson*, 2 C. B. 412. Thus, in *Cockburn v. Wright* (6 Bing. N. C. 228), where the court held that a voyage to London and back, with privilege of sending the ship to Calcutta, did not entitle the merchant to a voyage from Bombay to Calcutta, *Maule, J.*, said, "If we could import into this case knowledge that Calcutta is in the East Indies, and that it is usual on the outward voyage to take a cargo at Bombay to be discharged at Calcutta before the commencement of the voyage homewards, there might be some ground for the construction of the charter-party, for which the plaintiff contends."

So, where it was required by a charter-party that the ship should proceed to Newcastle, and there be ready to take on board a cargo, consisting partly of coals and partly of coke, "in regular turns of loading (the loading of coal in turns at Newcastle is regulated by act of parliament, but there is no statutory provision applying to coke), the court held that the meaning of the contract was, that the coal should be loaded according to the provisions of the statute, and that evidence ought to have been admitted on the trial of an action for not loading the coke to show that there was a usage at Newcastle to load coke in a similar manner. *Leidman v. Schultz*, 14 C. B. 38. See *Hudson v. Clementson*, 18 id. 213.

Goods were shipped at New Orleans, which by the terms of the bill of lading were deliverable at Liverpool to order or assigns, "he or they paying freight for the said goods five-eighths of a penny sterling per pound, with five per cent tonnage and average accustomed." By a custom prevailing at Liverpool in the trade in question, three months' interest or discount was deducted from freights payable under bills of lading on goods coming from New Orleans, but the shipowner claimed the full freight, contending that the custom was inconsistent with the contract. The court held that the custom was not repugnant to the contract, but might well be annexed to the terms of the bill of lading. *Brown v. Byrne*, 3 E. & B. 702.

A charter-party provided that "a full and complete cargo of sugar and molasses" should be laden on board the ship at Trinidad. Evidence was held admissible to show that a custom existed there to load sugar and molasses in puncheons, and consequently that a cargo loaded in this way was a sufficient compliance with the contract, though in this mode of packing there was necessarily some diminution of the cargo, by reason of broken stowage. *Cuthbert v. Cumming*, 10 Ex. 809; 11 Ex. 405, in error.

Where a question arose as to the meaning of the words, "in turn to deliver" at the port of Algiers, it was held that the testimony of three or four witnesses speaking to a course of business that had grown up within only about five years, and with reference to charter-parties differing in language from the charter-party in question, was not sufficient to establish such a general usage as to enable the court to construe these words in a particular way. *Robertson v. Jackson*, 2 C. B. 413. See *Taylor v. Clay*, 9 Q. B. 713.

The declaration stated that a charter-party had been entered into between the plaintiffs as charterers and the defendant as the owner of a ship, and by the charter-party the ship was consigned to the agents of the plaintiffs at Hong Kong free of commission on the charter, and then alleged that under such a charter the agents of the plaintiffs at Hong Kong were, by the custom of merchants in London, entitled to procure a charter or cargo for the ship for any voyage from Hong Kong, being paid thereupon a broker's commission on any freight payable under such charter, unless this right was excluded by express contract:—The court held that the declaration was bad, on the ground that the custom did not explain the charter but added a new term to it. *Phillips v. Briard*, 1 H. & N. 21.

The instrument expresses the freight to be paid, and generally the burthen of the ship, by which latter specification the parties are not, however, concluded. *Barker v. Windle*, 6 E. & B. 675. *Hunter v. Fry*, 2 B. & A. 421. The charter-party also contains covenants from the owner that the ship shall be tight, staunch, furnished with all necessaries; that she shall be ready by a certain day to receive, and shall wait a certain time to ship her cargo, shall sail at a particular time for her destined port, deliver the goods safely there, and be properly found in men and stores during the voyage to the best of the owner's endeavours. It may, of course, comprise

II. Obligations of the Shipowner.

(A) *Stipulation that the Ship is Seaworthy.*[1]

(B) „ *as to the due Appointment of the Ship.*[2]

any other engagements which the merchant thinks proper to exact and the owner to concede. Sm. M. L. 271.

A clause is usually to be found, exempting the owner from liability in case of his being prevented from performing his contract by restraint of princes. These will apply to an actual and not an expected restraint (*Atkinson v. Ritchie*, 10 East, 530), and enure to the benefit of the owner, not of the merchant. If this clause be limited "during the voyage," a delay arising from such cause at the port of loading is not comprised within it. *Crow v. Falk*, 15 L. J. Q. B. 183.

The merchant usually contracts to load and unload within a specified time, or if he detain the ship for a longer time, which he sometimes receives liberty to do, to pay a daily sum, which, as well as the delay itself, is called demurrage. It sometimes ends with a clause purporting to bind the ship's freight and cargo in a pecuniary penalty to the performance of the contract; but this seems to be inoperative. Abbott, pt. 3, c. 1; Sm. M. L. 271.

The following is a form of charter-party:—

It is this day mutually agreed between Messrs. A. B., agents for owners of the good ship or vessel called the Druid, A 1, 12, and newly coppered, of, &c., of the burthen of 340 tons register measurement, or thereabouts, whereof C. D. is master, now in Liverpool, Messrs. E. F., of Liverpool, merchants, that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, load in dock a full and complete cargo of lawful merchandise, not exceeding 400 tons in weight, and therewith proceed to X. or Y., as ordered before sailing, or so near thereunto as she may safely get, and there deliver the same agreeably to bills of lading, after which she shall load there, or if required proceed to one other safe port in [India], and there load in the usual and customary manner from the agents of the said charterers a full and complete cargo of [cotton] or other lawful merchandise, the cargoes being brought and taken from alongside the vessel at charterers' risk and expense. Ship is to have liberty to put on board eighty tons kentledge, copper dross, or other equally dead weight, and to retain it on board during the voyage, which the said merchants bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall therewith proceed to [Liverpool or London], as ordered on signing bills of lading abroad, or so near thereunto as she may safely get, and there deliver the same, in the usual and customary manner, to the said charterers or their assigns, they paying freight for the same at the rate of £ per ton for the journey out and home, a deduction of 5*s.* per ton to be made if ship be discharged and loaded at Y. Other goods, if shipped, to pay in customary proportion. In consideration whereof the outward cargo to be carried freight free, payment whereof to become due and to be made as follows:—Thirty running days (Sundays excepted) are to be allowed the said merchant if the ship is not sooner despatched for loading in Liverpool, and forty-five like days for all purposes abroad, and ten days on demurrage over and above the said laying days and time herein stated, at 10*l.* sterling per day, paying day by day as the same shall become due. The time occupied in changing ports not to count as laying days. Should it be necessary for the vessel to take in tonnage or ballast, the same to be provided by the owners. The master to sign bills of lading at such rates of freight as may be required by the agents of the charterers, without prejudice to this charter-party, and the owners to have an absolute lien less on the cargo for the recovery of all freight, dead freight, demurrage, &c., due to the ship under this charter-party. The act of God, the Queen's enemies, fire, strikes of pitmen, and all other damages and accidents of the seas, rivers, and navigations of that nature and kind soever, throughout the voyage, being excepted.

The vessel to be consigned to the charterers' agents abroad free of commission. On the return of the ship to Liverpool she shall be addressed to G. H. and Co., brokers, or to their agents at any port of discharge. Penalty for non-performance of this agreement the estimated amount of freight. Agent signing as such not liable. 29 L. J. Q. B. 93.

[1] With respect to the seaworthiness of a ship, the most important cases have arisen on questions of policies of insurance. There is, indeed, little distinction to be made between the nature and extent of the obligation from the merchant to the insurer, and that from the shipper to the freighter. Independent of the covenant in the charter-party, which only re-affirms and strengthens the general obligation, there is a strict and implied agreement that the ship shall be seaworthy, and capable of conveying the goods in proper condition. *See* 2 Ld. Raym. 909; 5 East, 428.

Where a ship is described in the charter-party as A 1, this is not a warranty that she shall continue so. *Hurst v. Osborne*, 18 C. B. 144.

[2] It is the duty, and generally constitutes one of the covenants on the part of the charterer, not only to provide a vessel tight and staunch, but to furnish her with all tackle and apparel necessary for the intended voyage; for if the freighter suffer loss or damage by reason of any insufficiency of these particulars at the outset of the

(C) *The Ship must be properly Victualled.*[1]

(D) *And her Crew, both in Number and Skill, must be sufficient for he r Navigation.*[2]

voyage, he will be entitled to a recompense. It has been observed, that an insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body there may be latent defects unknown to both. However, defects of this sort cannot exist, unless occasioned by the age or particular employment of the ship, or some accidental disaster that may have happened to it, which ought to be, and is probably, known to the owner as well as the master, and should lead to an examination of her interior as well as her exterior parts. In the case of a general ship, it is the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship; and she must also be furnished with proper dunnage, or pieces of wood placed against the sides or bottom of the hold, to preserve the cargo from the effects of leakage, according to its nature and quality. These things are frequently contracted for by an express clause in charter-parties, and may, perhaps, be considered as part of the necessary furniture of a chartered ship, without any express stipulation. *See* Emerigon, tom. i. pp. 373–375; Roccus. not. 19, 57, 69; *Ordinance of Rotterdam*, 2; Magens. p. 101, art. 124; Molloy, b. ii. ch. 2, sec. 10; Wellwood's *Sea Laws*, tit. 7, p. 22; Pothier's *Traité de Charte-partie*, num. 30; and Pothier's *Traité de Louage*, part 2, ch. 1, sec. 4, par. 2.

It seems advisable for the master, or owner of the ship, only to contract to keep the ship tight, &c. during the voyage, to the best of their endeavours, as it may sometimes be wholly out of their power fully to attain that object. Without such stipulation, they will be liable to an action on their covenant, if there be not a strict performance of it, though they may not be at all in fault; but such a stipulation will secure them from litigation in that event. By one of the laws of Wisby it is provided, that in case the master be at the charge of repairing the ship, or of buying anything for the service thereof, he shall be reimbursed, and every part-owner shall pay his share. Leg. Wis. 65. And by the common law, if nothing be said in the charter-party, or agreement of affreightment, respecting the repairs, but there is the usual stipulation that the ship shall be and continue tight, &c., the whole expense must be ultimately borne by the owners of the vessel. It is, indeed, sufficiently hard upon the freighter, that if repairs be wanting, and part of the time for which the ship is freighted be spent in making them, he is to have no compensation or allowance on that account, without making him contribute to the expense of repairing the ship of the owners.

Such covenants exempt the freighter from general average loss on the ship; and where it is agreed that the ship shall, at the expense of the owners, be kept strong and tight during the whole of the voyage, and it appears by the whole instrument that it was the intention of the parties that the defendant should not bear any expense in keeping the ship in repair, but that everything necessary to enable the ship to perform her voyage should be provided for by her owners, expenses incurred, as necessary in order to put the ship in a condition to complete the voyage, must be borne by the owner, who undertook to make the repairs, and cannot be thrown upon the merchant, as in a case of general average. 8 T. R. 509. In the case cited, it was agreed between the parties, that in the event of any of the goods being thrown overboard for the preservation of the ship or cargo, the defendant should contribute his proportion of a general average in respect of such goods; which, of itself, afforded a strong argument that he was not to be liable to general average in other cases.

[1] It is of equal importance that the ship should be properly victualled, as that she should be sufficiently manned; therefore, if there be no sufficient supply of fresh water, or other necessary provisions, in proportion to the voyage, the ship is, in effect, not seaworthy, or, in other words, not capable of performing the voyage for which she is chartered. See *Moffat v. East India Co.* 10 East, 468. No universal or precise usage need be shown as to the quantity or quality of the stores furnished to such vessels, or the like; but it would be sufficient to show what was the prevalent usage amongst merchants in this respect, and that the ship was fitted according to it.

[2] In *Wynne v. Fellows* (1 Show. 334), it appeared that the master of a vessel had covenanted that she should be well furnished with men, and that the freighter had covenanted that she should return within a given time. This was an action on the latter covenant, for not returning in time. The defendant pleaded that the ship was, at her departure, manned with the master, seven men, and a boy, and that she then sailed on her voyage to Jamaica, when six of the seamen left the ship, and that the master did not provide others in their room, whereby she was detained so long at Jamaica that she could not get back within the appointed time: — The court held this a good plea, as the non-performance of the plaintiff's covenant, in such case, disabled the defendant from performing his covenant. *See* 29 L. J. C. P. 253.

The covenant, that a ship shall be well furnished with men, means not merely that a sufficient number shall be taken on board, but that such number shall be provided, and kept on board her, during the whole voyage. By the laws of Oleron and Wisby, if a master turn a mariner out of a ship, upon any dif-

LAW v. HOLLINGSWORTH, 7 T. R. 160.

In this case, which was an action against an underwriter on a ship and cargo, and in which it appeared that the vessel had been lost when there was *no pilot* on board, at a period when there ought to have been such, *Lord Kenyon* made use of the following observations:—"The principle on which this case must be determined seems to be admitted on all hands; viz. that the assured cannot recover on a policy of insurance, unless the ship be equipped with everything necessary to her navigation during the voyage. The ship herself must be seaworthy; she must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound, in this case, to decide whether or not it be necessary that there should be on board the vessel a pilot qualified according to the act of parliament referred to. This case may be disposed of without deciding that question, as there was, in fact, *no pilot* on board the vessel when the accident happened; in which view of the case there must be judgment of nonsuit. *See* Selw. N. P. 937. *Beatson v. Schank*, 3 East, 233.

And also that her crew be sufficient to navigate her, both as to number and as to skill.

(E) *A Pilot must be provided where necessary.*[1]

(F) *And have the necessary Papers.*[2]

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ference or disagreement between them, notwithstanding an offer to make satisfaction, and take not another mariner into the ship in his stead as able as the first, and the ship or lading happen to be, through any misfortune, damnified, the master shall make good the loss or damage, if it happen for want of the assistance of the mariner turned out of the ship. Leg. Ol. 13 Leg. This applies to a general ship; but in case of one chartered with the usual clauses, the master is liable to an action upon his covenant, if he either omit to take a sufficient number of able seamen on board, or improperly cause them to leave the ship before the voyage is finished, or do not provide others in their room, in case of misconduct or desertion. *See* Lawes on Charter-parties, p. 31.

In *Tait v. Levi* (14 East, 481), which was an insurance case, the court held that there was a failure of the implied warranty, that a captain and crew, of competent skill and knowledge for the voyage, should be provided, the captain being so grossly ignorant as not to know Tarragona from Barcelona; the warranty in the policy being, that the vessel should not go higher up the Mediterranean than Tarragona.

[1] It is part of the duty of the charterer of a vessel to take care that a pilot be taken on board, in case of sailing down rivers, out of harbours, or through roads, &c., when either by usage, or by the laws of the country, a pilot is required. *See* 7 T. R. 160; *Ordinance of Wisby*, art. 59, 60; *Ordinance of Antwerp*, 2 Magens. p. 16, art. 9; Wellwood's *Sea Laws*, p. 23–26; *Ordinance of Rotterdam*, 2 Magens. p. 103, art. 139. But no owner or master of any ship or vessel is answerable for any loss or damage by reason of no pilot being on board, unless it is proved that the want of a pilot arose from any refusal to take a pilot on board, or from the negligence of the master in not heaving-to for the purpose of taking on board any pilot who shall be ready, and offer to take charge of the ship.

[2] The words "everything needful for the voyage," contained in a charter-party, include a "bill of health," if necessary to the ship's admission into port. *Levy v. Costerton*, 1 Stark. 212; 4 Camp. 389.

It may be here as a general rule observed, that the master must take on board no false or colourable papers that may subject the ship to capture or detention (Guidon, ch. 5, art. 33; Molloy, book ii. ch. 2, sec. 9); and, as a general rule, he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo, by the laws of the countries from and to which the ship is bound, and by the law of nations in general, and treaties between particular states. The rule of the French ordinance on this subject is, that the master must have on board the charte-partie and other documents relating to the proof of his lading. Liv. iii. tit. 1, Charte-parties, art. 10, and Valin thereon; *see* also Pothier's Charter-parties, num. 31. Valin, in his Commentary on the Ordinance, says, "that this article relates chiefly to a time of war; and that if a ship should be condemned as good prize on account of the master's failure in this respect, he must answer for the event." *See* case collected, Marsh. Ins. by Shee, 299.

Where the declaration on a charter-party alleged that it was the duty of the defendant, as the charterer, to hand over all bills of lading to the agents of the plaintiffs, in order that a complete and accurate consular manifest might be made out, and averred as a breach that the defendant did not deliver copies of all of the bills of lading to the plaintiffs' agent, and damage therefrom, the declaration was held bad, since it was not shown that either by the express contract or by mercantile usage, or under the circumstances set out, it became the duty of the defendant to hand over to the plaintiffs copies of the bills of lading. *Dutton v. Powles*, 30 L. J. Q. B. 169.

(G) *The Vessel must, according to the Covenant, repair to her Loading Port.*

(H) *And there load a full and complete Cargo.*[1]

HUNTER v. FRY, 2 B. & A. 421.

Upon a covenant in a charter-party to load a full and complete cargo, the court held, that notwithstanding the ship's burden was specified in the deed, the freighter was bound to put on board as many goods as the ship was capable of carrying with safety.[2]

By a charter-party a ship was described to be of the burden of 261 tons, and the freighter covenanted therein to load a full and complete cargo, not exceeding in the whole what the said ship could reasonably carry. The defendant, against whom, as freighter, an action was brought by the owner, loaded on board goods equal in number of tons to the tonnage described in the charter-party, which the plaintiff contended was not sufficient, as the vessel was capable of carrying with safety a larger quantity, and that he was entitled to recover damages for the difference between the freight carried for the goods actually shipped on board, and that which would have been carried if a full and complete cargo had been laden on board. The court, acquiescing in this view of the case, said: "The stipulation in the charter-party is not that the owner should receive, and the freighter put on board, a cargo equivalent to the tonnage described in the charter-party, but that one should receive a full and complete cargo, not exceeding what the ship was capable of receiving with safety, and that the other should put such a cargo on board. Now it is clear that the freighter would be entitled to recover damages against the owner, if the latter had refused to receive on board anything less than what the ship would carry with safety; and it therefore seems to us that the plaintiff is entitled to recover

[1] The vessel must, according to the covenant of the owner, proceed to her loading port. See *Shubrick v. Salmond*, 3 Burr. 1637. The port may be afterwards altered by parol, for in such a case the parol agreement merely borrows some of the terms of the charter-party by reference to it, but does not contradict or dispense with it. *White v. Parkin*, 12 East. 578. The master must use due diligence in proceeding to the loading port, or the freighter may be discharged (*Freeman v. Taylor*, 8 Bing. 124). A slight delay will not have this effect (*Clipsham v. Vertue*, 5 Q. B. 265), unless it be made a condition. *Glaholm v. Hays*, 2 Man. & G. 257.

Where, by the charter-party, the vessel was to go to the loading port immediately on being ordered by the charterers; and they gave such order, but there were enemies' cruisers outside the port in which she lay, by which she would have been exposed to capture if she had ventured out, the court held that it was reasonable and justifiable on the part of the master to delay going out until he had communicated further with the charterers. *Pole v. Cetcovich*, 30 L. J. C. P. 102; 7 Jur. N. S. 604.

[2] So, where a charter-party described the ship as "of the measurement of 180 or 200 tons, or thereabouts," the court held that this statement did not amount to a warranty as to the tonnage, but was a matter of description only, and that the charterer, who had contracted to put on board a complete cargo, could not refuse to load on discovering that the tonnage in fact slightly exceeded 257 tons. *Barker v. Windle*, 6 E. & B. 675.

It has been said that the performance of the ordinary stipulation in a charter-party, that the ship being "tight, staunch, and strong, shall sail," &c., does not constitute a condition precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. *Tarrabochia v. Hickie*, 1 H. & N. 183. *See* 29 L. J. C. P. 253.

In *Schilizzi v. Derry* (4 E. & B. 873) it was held that a shipowner was not discharged from his liability to complete the voyage and to take his ship to a port up the Danube, at which it was agreed by the charter-party that a cargo should be laden, by reason of a want of water at the mouth of the river, which lasted two months, even although the charter provided that the ship should proceed to the port of lading, "or as near thereto as she might safely get," and contained the ordinary exception as to perils of the seas; and although it also appeared that it would not have been safe for the ship to lie, during the latter of the two months, off the mouth of the Danube.

Where a charter party provided that a ship should proceed to a particular port, and there load a full cargo of coals in the customary manner, no time being mentioned, it was held that this meant a loading according to the usage of the port, and within a reasonable time, without reference to unforeseen casualties. *Adams v. The Royal Mail Steam-Packet Co.* 5 C. B. (N. S.) 492.

Although a master of a vessel may agree that he will load a complete cargo, and proceed and deliver the same on being paid freight, yet such a covenant is not a condition precedent to the right to freight. *Ritchie v. Atkinson*, 10 East, 295.

As to the refusal to receive dangerous goods, see *Seeger v. Duthie*, 30 L. J. C. P. 65; 7 Jur. N. S. 239.

the difference between the freighter of the goods actually laden on board, and the freight of those which, by the terms of his covenant, he was bound to load on board." Judgment for the plaintiff.

(*a*) *Time for Loading and Unloading.*

SHEELS v. DAVIES, 4 Camp. N. P. C. 119.

This was an action of *assumpsit* for the freight of a cargo of butter, carried in a general ship, and received by the defendant under a bill of lading. It was offered as evidence in defence, that the butter had been injured by bad stowage, to a degree much beyond the amount of freight; and it was contended that this was a sufficient answer to the action, as it showed that no benefit had been derived from the carriage of the goods; and, at any rate, it might be given as evidence in mitigation of damages. It was admitted, that bad stowage was an injury, for which the master was responsible; but it was decided that the freight had been earned, and that the damage by stowage must be made the subject of a cross action.

Another part of the duty arising from the covenant to load the vessel is, so to load, stow, and arrange the different articles of which the cargo consists, that they may not be injured by each other, or by the motion or leakage of the ship, or by any other means.[1]

(I) *What Goods Owner bound to receive.*[2]

[1] *See* Wellwood, p. 29; *Ordin. of Antwerp*, 2; Magens. p. 16, art. 8; *French Ordinance*, liv. ii.; *Laws of Wisby*, art. 23; *Laws of Oleron*, art. 11, and Cleirac thereon.

The manner of taking the goods on board, in compliance with the covenant to load the vessel, and the commencement of the master's duty in this respect, depend on the custom of the particular place. It is in all cases the duty of the master to provide ropes, &c. proper for the reception of the goods into the ship. *Laws of Oleron*, art. 10; *Laws of Wisby*, art. 22; Wellwood, tit. 9. And if a cask be accidentally staved by letting it down into the ship's hold, the master must answer for the loss. *Goff v. Clinkard*, 1 Wils. 282.

The laws of Oleron (cited temp. R. 1. A.D. 1300) and Wisby provide, that if in hoisting of wines, &c. the men do not fasten the ropes well at the ends of the pipes, &c. so that they slip and fall, and are lost, the master and mariners are bound to make them good to the merchants; but the merchants must pay the freight of the damnified or lost wines, because they are to be paid by the master and mariners what the rest of the wines shall be sold for. The owners of the ship are not by those laws to suffer because the damage happened by default of the master and mariners. Leg. Ol. 26; Leg. Wis. 23. But in cases of chartered ships, the master or owners, or any other persons, who bind themselves by the charter-party, and such alone, are answerable for the breach of any of their covenants or agreements contained in it, whether it be under seal or not. In general, the freighter covenants to bring the goods alongside the vessel, and the master or owners to load and stow them properly on board, which, of course, makes them answerable for any misconduct or negligence in the loading or stowage. *See* Lawes on Charter-parties, p. 37. As soon as any goods are put on board, the master must provide a sufficient number of persons to protect them, for even if the crew be overpowered by a superior force, and the goods taken while the ship is in a port or river within the body of a county, the master and owner will be answerable for the loss, although they have been guilty neither of fraud nor fault, the law, in this instance, holding them responsible, from reasons of public policy, and to prevent any combinations between thieves and robbers.

[2] It is in general the duty of the captain and owners to receive such goods as are brought to them; though, if the charter-party be for the affreightment of particular goods, or the property of particular persons, the captains and owners can only be obliged to load such goods or property. More must not be taken on board than the ship can conveniently carry, leaving room for her own furniture and the provisions of the crew, and for the proper trading of the vessel. *See* Roccus, vol. 30. Neither may the master take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture and detention. Molloy, b. ii. ch. 2, s. 7. Where it was stipulated by a charter-party that the merchant should have the exclusive use of the ship outward, and the exclusive privilege of the cabin, the master not being allowed to take any passengers: on the trial of an action against the owner for a breach of this stipulation, evidence was allowed to explain that under a charter-party so worded, it was the constant custom of trade to allow the master to take out a few articles for a private trade, and that it was therefore the implied understanding between the parties at the time of executing the charter-party. Abbott, 9th edit. 229.

It is said by Malyne, in his chapter on Affreightment by Charter-party, that if the master take on board more lading than the acknowledged burden of the ship, especially if it consist of other persons' goods than the freighter's, he loses his whole freight, for by this he may endanger the merchant's goods which he has contracted to carry; and in such case, if any part of these goods are

(J) *Obligation as to Time of Sailing.*[1]

Bornmann v. Tooke, 1 Camp. 377.

Covenant to sail with the first favourable wind is not a condition precedent to the recovery of freight.[2]

By a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, *to sail with the first favourable wind direct to the port of Portsmouth.* The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. This was an action of

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cast overboard in a storm, the loss shall not be made up by contribution or average of the merchants, but by the master's own purse. Mal. 99. Malyne also further lays it down, that if any man compel the master to overburden the ship or boat, he may be accused criminally, besides being compelled to pay the damages happening thereto. Id. Nearly to the same effect Beawes observes, that if the master lets out the ship, and afterwards secretly takes in other goods unknown to the first freighter, *by the law marine* he loses his freight; and if it so happen that any of the freighter's goods, for safety of the ship, be cast overboard, the rest shall not become subject to the average, but the master must make the damage good; though if the goods be brought into the ship secretly, and unknown to him, it is otherwise. Beawes, 137. The observations of both these writers seem to be founded on one of the laws of Wisbuy, which provides, that the ship being laden, the master must not take in any more goods without the merchant's leave, and if he fails therein, in case there be casting of the goods overboard, he shall be a loser by so much more commodities as he has taken on board over and above what he ought. Therefore, upon the lading of the ship, he ought to declare his intention to take such and such goods. Leg. Wis. 46. But though this seems to be the universal law on the subject, the rule of the common law, in the absence of any express provision in the charter-party on the subject, in analogy to other cases, seems to be this, that if the master overloads the ship by putting on board more than she can reasonably stow and carry, over and above her tackle, &c., by which a damage happens to the freighter, his so doing would be a breach of the *implied* covenant in the charter-party not to do so, by the words "that he will load and stow all such goods as shall be sent alongside, *not exceeding* what the ship can reasonably stow and carry, &c." See Lawes on Charter-parties, p. 37, 38, 39.

[1] Every precaution being taken in the performance of the owners' covenants and consequent duties, previous to the commencement of the voyage, the master must forthwith obtain the necessary clearances or permission to sail from the officer of the customs, or others appointed for the discharge of vessels, and pay the necessary port and other charges for that purpose, and commence his voyage without delay as soon as the weather is favourable. Guidon. ch. 5, art. 33; Molloy, b. ii. ch. 2, s. 9; *Ordin. of Rotterdam*, 2; Magens, p. 102, art. 128. But he must on no account sail out during tempestuous weather. Molloy, b. ii. ch. 2, s. 4; Roccus, n. 56. This obligation is usually expressed in charter-parties by the words, "that the vessel shall, with all convenient speed, sail and proceed to such a port, or as near thereto as she may safely get." When by the terms of a charter-party a number of days is appointed for the lading of the cargo, either generally and without payment on that particular account by the merchant, or by way of demurrage, the master must not sail before the expiration of the time. Upon the conclusion of this time he must sail from port with the first favourable wind; and thence proceed to the place of destination without delay. Where, however, the above form is adopted, it becomes a question for the jury to decide, if any doubt arise respecting it in an action on the charter-party, whether he did or did not sail within a reasonable and convenient time, which may depend on many circumstances, as the state of the vessel, or of the wind and weather; or whether any embargo in port, or enemies at sea, or the like, may or may not have rendered it proper, possible, or expedient, for him to have set sail. *M'Andrew v. Adams*, 1 Bing. N. C. 29. See *Clipsham v. Vertue*, 5 Q. B. 265.

[2] See *Cole v. Shallett*, 3 Lev. 41.

Where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage. *M'Andrew v. Adams*, 1 Bing. N. C. 38. *Freeman v. Taylor*, 8 Bing. 124. *See* 29 L. J. C. P. 253.

A provision in a charter-party that the ship should be ready to sail "in all May," has been held to form a condition precedent. *Oliver v. Fielden*, 4 Ex. 135.

A charter-party provided that the ship should sail from Amsterdam for Liverpool "on or before the 15th March next:"—*Held* that the sailing of the ship on or before that day was a condition precedent to the obligation of the charterer to load the vessel, although the sailing of the ship was prevented by one of the perils excepted in the charter-party. *Crookewst v Fletcher*, 1 H. & N. 893.

Where a charter-party described the ship as then at sea, and "having sailed three weeks ago," the statement was held to amount to a warranty of the fact. *Olive v. Booker*, 1 Ex. 416. A mere representation,

indebitatus assumpsit for the freight. It was contended for the defendant, that the plaintiff's sailing with the first favourable wind direct to Portsmouth was a condition precedent to the recovery of freight, and that the damage suffered by the defendant might, at any rate, be given in evidence in reduction of damages. But *Lord Ellenborough* said, that to hold that any short delay in setting sail, or trifling departure from the direct course of the voyage, would entirely destroy the plaintiff's right to be remunerated for transporting the cargo, would indeed be going *inter apices facti*, and that the defendant must bring his cross action for any loss he might have suffered from the default of the plaintiff.

(K) *With Convoy.*

Snell v. Marryatt, Abbott on Shipping, 265, 9th ed.

If there is a clause inserted in the charter-party to sail with convoy, the vessel must repair to the place of rendezvous for that purpose.[1]

This was an action brought by a person who had shipped goods on board a general ship for Grenada, against the owner, for having sailed without convoy, in consequence of which he had lost the benefit of an insurance which he had effected, the ship having been captured on the voyage. The ship had been put up or advertised "to sail with convoy." The bill of lading made no mention of convoy. It was, in fact, intended that the ship should sail with convoy, but she was blown out of the Downs in a gale of wind, and the master then intended to go to Falmouth, to wait for a convoy; but being prevented from doing so by the appearance of a French privateer, by which he was chaced, he made sail for Grenada, and was afterwards taken. At the trial the defendant obtained a

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however, at the time of the making of the charter-party as to the ship's position, will not amount to a warranty. *Elliott v. Von Glehn*, 13 Q. B. 632.

Although it appears that the owner will not absolutely lose his freight by a delay in the commencement of the voyage, if the voyage be afterwards performed; yet if the merchant sustains any injury by such delay, he will be entitled to a compensation in damages proportioned to his loss. Note on the Guidon, c. 7, s. 10, p. 240; Roccus, n. 56; Straccha de Nautis, par 3. num. 3, 4, and 5; Malyne, p. 98. Supposing the covenant had been, that if the plaintiff would sail with the next fair wind, then the defendant will pay the freight; there the circumstance of her so sailing might, by the word *if*, be made a condition precedent to the plaintiff's right to freight, and become a substantial part of the contract: so that in an action on the charter-party for the freight, the plaintiff must aver and prove that he sailed with the first wind, the allegation being traversable; but it is not traversable in the first case above supposed, though alleged. *See* Lawes on Charter-parties, p. 43; Dougl. 272; Palm. 397.

If a ship be not ready on the appointed day, and the charterer has derived no benefit from the charter-party, he may rescind it *in toto*, and procure another ship for the conveyance of his goods; and if he has shipped part of his goods, he may ship the remainder of them on board another ship, and recover damages against the owner. *See* Cro. Car. 383; 3 Lev. 288; 1 Beawes, 188; Mal. 98; Moll. b. ii. c. 4, s. 3; Com. Dig. Merchant, E. 7; Abbott, 193. Molloy says, that if the master put to sea after the time fixed for his departure, and any damage then happens, he is answerable for the consequences. Moll. b. ii. c. 2, s. 6. It seems, that although it may be physically impossible to get out of port from the state of the wind, yet this or the like unavoidable circumstances will not protect the master from an action on his express contract, unless there be the usual exceptions in the charter-party. Such exceptions would, undoubtedly, have that effect; and if, by any accident or inadvertence they be omitted, it cannot be worth while to sue for the breach of a covenant whereon no more than nominal damages can be expected, which is generally the case with the covenant in question, unless gross negligence or misconduct be the cause of it, which seldom happens.

A covenant that a ship should sail as soon as sentence of condemnation was passed upon her, means sentence passed by a court of competent jurisdiction. *Unwin v. Wolseley*, 1 T. R. 674.

[1] And if the master neglect to proceed with convoy, he will be liable for all losses arising from the want of convoy. *Thompson v. Inglis*, 3 Camp. 428. The convoy must be a ship or ships of war appointed by the government, or their agent, as the protection of a ship of war accidentally bound on the same voyage, although discharging the office of a convoy, is not a convoy within the meaning of a covenant to sail with one. *Hibbert v. Pigou*, Park on Ins. p. 443.

The covenant to sail or depart with convoy does not mean that the vessel shall depart with convoy immediately from the lading port, but only from the place of rendezvous appointed for vessels bound from that port; therefore, if the lading port be London, and the place of rendezvous the Downs (*Lethulier's case*, 2 Salk. 443; 3 Lev.

verdict. The court was afterwards moved to grant a new trial; and the case was argued at some length. A new trial was granted, in order that the court might receive further information; and the attention of the counsel was directed to the following points: whether the concise expression, "to sail with convoy," meant anything more than that the ship was intended to sail with convoy; or could be construed as a warranty that the ship should sail with convoy, in the strict sense of the word warranty; what was the effect of the bill of lading, which made no mention of convoy; what was the effect of the endeavours used by the master to sail with convoy, and of the circumstances by which he had been prevented from doing so. The cause was not taken down for a second trial.

(L) *Stipulation for Lay Days and Demurrage.*[1]

41), or Spithead, it is sufficient if the vessel sail with convoy from thence. *Gordon v. Morley*, 2 Stra. 1265.

The consequence of the master not sailing with convoy according to covenant, may be his liability to an action for any damages happening to the cargo, though occasioned by the accidents excepted in the charter-party, from which he would have been exempt if he had pursued the directions contained in it; for the exception is only meant to protect him from such accidents, in case of pursuing those directions. And if, in confidence of the master's covenant, the freighter's effects are insured, with a warranty or stipulation that the ship shall sail with convoy, it seems that he may sue the master for that indemnity which by his misconduct or neglect he cannot obtain of the underwriters. (Abbott, 9th ed. p. 291.) Nothing less than a warranty or covenant, &c. to sail with convoy will charge the captain or shipowner; though such warranty may, perhaps, be implied from circumstances. It has been made a question, whether the mere expression in the advertisement of a general ship, "to sail with convoy," means anything more than that the ship is intended to sail with convoy, or can be construed as a warranty that the ship shall so sail, where the bills of lading make no mention of convoy. *Snell v. Marryatt, supra.* The necessity of sailing under convoy does not at all times depend merely upon a special undertaking or warranty for that purpose; during war, it has been thought expedient by the legislature of different states to compel merchant vessels, in many cases, to place themselves under this protection, as a measure of public policy, to prevent the enemy from enriching himself by their capture. The construction that has been put upon an undertaking to sail with convoy, will in general be found to be the true construction of these acts of parliament. And *see* 1 Taunt. 249; 3 id. 131; 1 B. & P. 5; 2 id. 164; *post*, Convoy Act.

[1] With respect to the time allowed for loading and unloading, it is held that the merchant must pay demurrage for any delay beyond the arranged period, even though not attributable to his fault, but to some unforeseen impediment to her loading or unloading (*Barker v. Hodgson*, 3 M. & S. 267. *Barrett v. Dutton*, 4 Camp. 333. *Thompson v. Wayner*, id. n. 335), such as the crowded state of the docks, for he has expressly engaged, and is bound by the terms of his own positive contract. Abbott, pt. 3, c. 1. See *Gibbons v. Buisson*, 1 Bing. N. C. 283. *Pringle v. Mollett*, 6 Mee. & W. 80. *Leer v. Yates*, 3 Taunt. 387. *Kell v. Anderson*, 10 Mee. & W. 502; *Hills v. Sughrue*, 15 id. 253. So, though he may not have been apprised of the ship's arrival (*Harman v. Clarke*, 4 Camp. 159); or the bill of lading have not come to his hands, without which, or an indemnity, the master, as he has a right, refuses to deliver the goods. *Jesson v. Solly*, 4 Taunt. 52. But where the detention was occasioned not by any impediment to the ship's loading but by ice, which prevented her from sailing *after* she was loaded, it was held that demurrage was not payable, since, to render the freighter liable to it, the delay should have been for the purpose of loading. *Pringle v. Mollett*, 6 Mee. & W. 80. When the owners interrupted the unloading by their wrongful interference, they were not allowed to receive demurrage, though the unloading, in fact, occupied a greater number of days than would under the charter-party have been allowed, had the owners abstained from such interference. *Benson v. Blunt*, 1 Q. B. 870; and see *Taylor v. Clay*, 16 L. J. Q. B. 44. If a certain demurrage be agreed on for the time during which the ship may be obliged to wait for convoy or to receive a cargo, it ceases in the former case as soon as the convoy is ready (*Lamoy v. Werry*, 2 Bro. P. C. 60), and in the latter, as soon as the cargo is laden and the clearances obtained (*Garriesin v. Lawrie*, 6 id. 474; but see *Barrett v. Dutton*, 4 Camp. 333. *Thompson v. Wagner*, note, id. 335. *Herman v. Gandolphi*, Holt, 35), though the ship be longer detained by tempestuous weather, or set out and be driven into port again.

The days mentioned in the clause of demurrage are, by the custom of merchants in London, understood to be working days (*Cochrane v. Retburgh*, 3 Esp. 121), in the absence of custom, running days, are taken to be meant (*Brown v. Johnson*, 10 Mee. & W. 331); as to holidays excepted, *see* 29 L. J. Q. B. 206; it is proper to state whether working or running-days be intended. When a certain number of lay days are allowed for unloading, they are to be reckoned from the

(M) *Obligations during the Voyage.*[1]

(N) „ *on the Completion of the Voyage.*[2]

vessel's arrival, not at the entrance of the port, but at the usual place of discharge: to hold otherwise would be extremely inconvenient in many points, *ex. gr.* that of London, which extends to Yantlett Creek. *Brereton v. Chapman*, 7 Bing. 557. Accordingly, in *Brown v. Johnson* (10 Mee. & W. 331), where the words were "for discharging" at her destined port, they were held to mean from her arrival in dock, not from her arrival at the entrance of the port, or at the place in the dock where she had to unload. See *Kell v. Anderson*, 10 Mee. & W. 498.

The substitution, by mutual consent, of a new port for that named in the charter-party, without mention of lay days, will not have the effect of depriving the merchant of the lay days stipulated for in the original contract. *Jackson v. Galliney*, 5 Bing. N. C. 71.

Where the merchant fails to load within the stipulated time, the master may sail home again; and in that case any cargo which may have been loaded, although not the stipulated one, will go in reduction of the freight, for the benefit of the merchant. *Puller v. Staniforth*, 11 East, 232. *Lidgett v. Williams*, 4 Hare, 456. *Harries v. Edmunds*, 1 C. & Kir. 686), unless a particular sum have been agreed on as the forfeiture in case of the merchant's default: in which case the owner would be entitled to receive that sum, and also anything more the ship might earn, even though he might thereby get a larger sum than the freight stipulated for. *Bell v. Puller*, 2 Taunt. 285; Sm. M. L. 273; Abbott, 220, 9th ed.

Where the charter-party provided that the vessel should proceed to Trieste, and there load a full cargo—the vessel to sail from England on or before the 4th of February next—it was held that the breach of the owner's contract to sail by that day discharged the merchant from his obligation to procure a cargo.

Per Tindal, C. J. "The very words, 'to sail on or before a given day,' import the same as the words 'conditioned to sail.' And looking at the subject-matter of the contract, without regarding the precise words as a condition precedent, will carry into effect the intention of the parties with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages. Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend on the commencement of the voyage by a given time—the nature of the commodity to be imported—the state of the foreign and home market at the time when the contract or charter-party is made—and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will as effectually insure both despatch and certainty as the knowledge that the obligation of the contract itself shall be made to depend on the actual performance of the stipulation which relates to them." *Glaholm v. Hays*, 2 Man. & G. 257.

[1] The vessel must proceed to her destined port without deviation, for if she deviate unnecessarily, and be lost, the master and owners are responsible, although the loss be by the act of God or the king's enemies. *Parker v. James*, 4 Camp. 112. *Davis v. Garrett*, 6 Bing. 716. The master must use every effort to convey the cargo safely to its destination; and if by reason of a storm, or some other unexpected cause, it becomes impossible to do so in his own vessel, he is bound to do what a prudent man would think best for the benefit of all concerned. Transhipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose. See *Shipton v. Thornton*, 9 Ad. & E. 314. If that be impracticable, return or a safe deposit (see *Liddard v. Lopes*, 10 East, 526) may be expedient. The merchant should be consulted if possible. *Wilson v. Millar*, 2 Stark. 1. A sale is the last thing a master should think of, because it can be only justified by that necessity which supersedes all human laws. If he sell without necessity, his owners, as well as himself, will be answerable to the merchant (*Freeman v. East India Co.* 5 B. & A. 617. *Wilson v. Dickson*, 2 id. 2), and they will be equally answerable if he place the goods at the disposal of a Vice-Admiralty Court in a British colony, and they are sold under an order of the court, such court having no authority to order a sale (*Cannan v. Meaburn*, 1 Bing. 243; 8 Moore, 127); and the persons who buy under such circumstances will not acquire a title as against the merchant (*Morris v. Robinson*, 3 B. & C. 196), but must answer to him for the value of the goods. Abbott, p. 304, 9th ed.

The master's authority, however, extends to hypothecate the cargo, or even sell a part of it, where it is necessary to do so for repairs, in order to the preservation of the entire venture (the *Gratitudin*, 3 Rob. Am. R. 240), and if he do the latter, the merchant, on the ship's safe arrival at the place of destination, will have a right to receive what the goods would have fetched if brought thither (*Alers v. Tobin*, Abb. p. 3, c. 3, s. 10), or may elect to take the sum they actually sold for; and may in that case, if he please, deduct it from the freight. *Campbell v. Thompson*, 1 Stark. 490.

[2] On the completion of the voyage the master must have the vessel properly moored, report his ship and crew, exhibit his manifest and other papers to the proper officers, and deliver up the cargo to the consignee named in the bill of lading, on pay-

(O) *Responsibility of Owner for Loss of or Damage to Cargo.*[1]

ment of the freight and charges in respect thereof, generally primage and average, and the master need not in general part with the goods till they are liquidated (28 L. J. Ex. 278); but if it appear from the bill of lading that the freight or charges have been paid, he is estopped from claiming them as against the assignee of such bill of lading. *Howard v. Tucker*, 1 B. & Adol. 712. But as between the shipper of goods and the owner of the ship a bill of lading does not operate as an estoppel (*Bates v. Todd*, 1 M. & Rob. 106. See *Beckly v. Watling*, 7 Ad. & E. 29); he cannot detain the goods of one person for charges upon those of another, though he may any part of what is consigned to one and the same person for the charges upon it all. *Sodergren v. Flight*, cited 6 East, 622. *See* 28 L. J. Ex. 278.

The manner of delivering up the goods, and consequently the period at which the master ceases to be responsible for them, depends on the absence of agreement or the custom of the place. *Wardell v. Mourillyan*, 2 Esp. 693. In the absence of any custom upon the subject, the consignee's right is to have reasonable time and opportunity for coming and receiving them from the ship's side. *Gatliffe v. Bourne*, 4 Bing. N. C. 314. *Bourne v. Gatliffe*, 4 Scott, 1; 3 Man. & G. 643; 7 id. 850; 11 Clark & Fin. 45. If the consignee send a lighter for the goods, the master must, by the custom of the river Thames, watch them in the lighter till it is fully laden (*Catley v. Wintringham*, Peake, N. P. C. 150), but not afterwards. *Robinson v. Turpin*, Abbott, p. 3, c. 3, s. 12.

[1] The responsibility of the owner at common law is coextensive with that of common carriers by land; that is, he is responsible for everything, except losses by the act of God or the Queen's enemies (*see ante*, p. 30); this obligation is, however, generally narrowed by the express stipulations of the charter-party or bill of lading, and it has also been qualified by legislative enactment.

Stat. 26 Geo. 3, c. 86, s. 2, enacts, that "No owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the same ship or vessel."

And by sect. 3, "No master, owner, or owners of any ship or vessel shall be liable to answer for or make good any loss or damage which may happen to any gold, silver, diamonds, watches, jewels or precious stones, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master or owner or owners of such ship or vessel, the nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones." It is doubtful whether this statute extends to shipments made in foreign parts. *Gibbs v. Potter*, 10 Mee. & W. 70.

By stat. 6 Geo. 4, c. 125, the Pilotage Act, s. 53, owners and masters of ships are exempted from liability for any damage arising from the want of a licensed or duly-qualified pilot, unless it be proved that such want arose from any refusal to take one on board, or from wilful neglect in not laying-to, or using all practicable means consistent with the ship's safety, for the purpose of taking on board any pilot who may offer. Sect. 55 exempts them from liability for damage arising from the neglect, default, incompetency, or incapacity of any licensed pilot in charge of the vessel, so long as such pilot shall be duly qualified to have charge of the vessel, or no duly qualified pilot shall have offered to take charge thereof. *The Protector*, 1 W. Rob. 45. *The Agricola*, 2 id. 10. See *Neptune the Second*, 1 Dodson, 467. The exemption conferred by this section extends to all cases in which the pilot was bound to take charge of the ship, though the master may not have been bound to employ him; as, where she was only moving from another part of the harbour into dock. *Lucy v. Ingram*, 6 Mee. & W. 302. *The Fame*, 2 W. Rob. 184. But if the mischief arose partly from the misconduct of the crew, the owner is not excused. *The Diana*, 1 id. 131. *Stuart v. Iremonger*, 4 Moore, P. C. 11. As to the ships to which this provision extends, see *The Girolamo*, 3 Hagg. 169; *The Vernon*, 1 W. Rob. 316; *The Maria*, id. 95.

Stat. 7 Geo. 2, c. 15, s. 1, exempts the owner from responsibility for loss by reason of any embezzlement, secreting, or making away with by the master or mariners, or for any act, matter, or thing damaged or forfeiture done, occasioned, and incurred by the same persons without the privity of the owners, further than the value of the ship, with her appurtenances, and the freight due or to grow due for the voyage wherein such loss happened. See *Sutton v. Mitchell*, 1 T. R. 18.

Stat. 26 Geo. 3, c. 86, s. 1, extends the provisions of this act to all cases of robbery, though the master or mariners be not concerned therein.

By stat. 53 Geo. 3, c. 159, owners are not liable to answer for, or to make good, any loss or damage arising by reason of any act, neglect, matter, or thing done, committed and occasioned, without the fault and privity of such owner or owners, which may happen to any goods, wares, merchandises, or other things laden or put on board the ship, further than the value of the ship (see *Dobree v. Schroder*, 6 Sim. 291. *Brown v. Wilkinson*, 15 Mee. & W. 391; and *The Richmond*, 3 Hagg. 431) and freight

III. Obligations of the Merchant.

(A) *To furnish a Cargo.*[1]

(B) *To pay Freight.*[2]

due or to grow due during the voyage, which may be in prosecution or contracted for at the time of the happening of the loss. In construing this section, the costs of obtaining the compensation are allowed beyond the value of the ship's freight. *The Dundee*, 1 Hagg. 109. *Ex-parte Rayne*, 1 Q. B. 982.

Sect. 2 of this statute defines what shall be considered freight within its meaning and that of the two prior acts, and directs that distinct losses happening during the same voyage, or same interval between two voyages, shall be compensated in the same way, and to the same extent, as if no other loss had happened during the same voyage or interval; and, as well as the two former acts, provides a proportionable compensation in cases where the value of the ship and freight is less than the total amount of losses, and a mode of distribution and relief in equity. But this act does not extend to vessels used solely in rivers and land navigations, nor to any ship not duly registered according to law, nor do any of the acts extend to lighters and galiots. *Hunter v. M'Gowan*, 1 Bligh, 573.

The benefit of the three last-mentioned acts does not extend to masters, and the last contains a provision against relieving the master, who happens to be a part-owner, from responsibility.

[1] The merchant who has taken a ship to freight must load her within the stipulated time, and, even if no time be expressly stipulated, must do so in a reasonable time. *Wolley v. Reddelien*, 5 Man. & G. 316. Where, by the charter-party, the ship, after delivering her outward cargo at Malta, was to sail with all convenient speed to such port—to Marseilles, Genoa, or another safe port on the west coast of Italy not higher than Manfredona, as should be ordered at Malta—it was held, that the merchant impliedly undertook that she should receive orders within a reasonable time from her arrival at Malta.

The charterer must load her with the stipulated cargo. Where the merchant undertook "to furnish and provide for loading on board the said ship a full and complete cargo of copper, tallow, and hides, or other goods, it was held by *Lord Ellenborough*, that the stipulation was performed by furnishing as large a quantity of tallow and hides as she could take on board, though, in consequence of the absence of copper, she was obliged to keep in her ballast. *Moorsom v. Page*, 4 Camp. 103. And where the stipulation in the charter-party was to furnish "a full and complete cargo, and that 100 tons of rice or sugar should be shipped, previous to any other part of the loading, to ballast the vessel," the court held that the owner was bound to supply any ballast that was necessary beyond the 100 tons, and that the merchant was not bound to pay freight for the additional tonnage of such ballast (*Irving v. Clegg*, 1 Bing. N. C. 53); for, as the owner is bound to have his vessel in a fit state for the voyage, it is his duty, in the first instance, to provide ballast, and the merchant's liability to do so can in no case reach beyond his express undertaking. Where the vessel was to sail to Rio Nunez, discharge there, and reload a full and complete cargo, freight to be paid at certain rates on certain specified articles, namely, gum, bees-wax, rice, bullion, &c.; should rice exceed eighty tons, 1*l.* per ton extra on surplus hides, not to exceed fifty tons; should she not be full at Rio Nunez, the merchant to have the liberty of filling her up at St. Mary's:—*Held*, that "a full and complete cargo of lawful merchandise" meant a cargo of goods *ejusdem generis* with those specified, and that the merchant was not justified in shipping a great quantity of lumber at St. Mary's, though that was the staple commodity there, but must pay freight as if he had shipped the proper cargo. *Capper v. Foster*, 3 Bing. N. C. 938.

The charterer must put on board no contraband goods whereby she may be subjected to forfeiture. For a default in any of these particulars he will be liable to make good the injury sustained in consequence. He must also pay the charges due on his commodities: these are usually primage, average, demurrage, and freight. Primage is a small customary payment to the master for his care and trouble; average denotes several petty charges—such as towage, beaconage, &c. As to demurrage, *see ante*, p. 88; and as to freight, *infra*.

[2] Freight is the payment made for the conveyance of the merchandise (*Lewis v. Marshall*, 7 Man. & G. 729) to its destination; it denotes the price of carriage, not of receiving goods to be carried, and therefore, though a merchant may of course contract to pay a sum of money to a shipowner for taking goods on board, yet such payment is not, strictly speaking, freight. *Blakey v. Dickon*, 2 B. & P. 221. *Andrew v. Moorhouse*, 5 Taunt. 435. Abb. p. 3, c. 7. Hence it follows, that no freight becomes due, unless the carriage of the goods be completely performed. *Mashiter v. Buller*, 1 Camp. 84. *Crozier v. Smith*, 1 Man. & G. 407. In consequence of this rule, when a ship has been engaged to sail from one port to another, as from A. to B. and back again, it often becomes important to know whether this employment is to be looked upon as consisting of one or two distinct voyages, since, if the ship be lost after her transmit from A. to B., but before that from B. back

to A. has been completed, freight will, by adopting the latter construction, be due for the carriage from A. to B., but not from adopting the former. In solving this question, the court must be guided by the intention of the parties as collected from the words and subject-matter of the agreement. *Byrne v. Patterson*, Abb. p. 3, c. 7, s. 17. In *Crozier v. Smith*, 1 Man. & G. 407, the ship was to sail to Jamaica, and having discharged her outward cargo there, "receive a cargo from thence, or from a port in the Spanish Main if required;" if she should be required, 4*l.* per diem was to be paid till she should be despatched from her loading port:—*Held*, that the voyage from Jamaica to the Spanish Main was not a distinct voyage, but part of the homeward.

The owner will not lose his freight in consequence of an interruption, without his fault, of the voyage, which is afterwards completed, such as a capture and recapture (*The Racehorse*, 3 Rob. Am. R. 101. *Beale v. Thompson*, 3 B. & P. 405); and if the goods have been thrown overboard for the ship's preservation, the merchant must pay freight and be repaid by a general average. (*See* vol. ii. p. 70.) So, if a part be sold for necessary victuals or repairs, the owners pay the merchant the value and receive the freight from him. If the ship and cargo be taken, retaken, and carried by the recaptors into a port short of its destination, and there, in consequence of some legal doubt or of the merchant's delay, the ship be restored before the cargo, the owners need not wait to convey the latter to its destination, but are entitled to the freight, subject to salvage. Abb. Ship. p. 3, c. 7, ss. 5, 6.

Where by the charter-party a gross sum is to be paid for the whole or a part of the ship, it becomes due, although the merchant do not provide a complete lading. If the master improperly refuse to take the entire quantity of goods agreed on, he will, nevertheless, if the payment was to be per cask or bale, have a right to a compensation for what he has carried (*Ritchie v. Atkinson*, 10 East, 295), as he will in case of his deviating (*Bornmann v. Tooke*, *supra*, p. 86), or sailing with his ship out of repair (*Havelock v. Geddes*, 10 East, 555), or not sailing according to stipulation with the first wind or convoy (*Constable v. Clolerie*, Palmer, 397. *Hall v. Cazenove*, 4 East, 477). The rule, as stated by *Lord Ellenborough* (*Davidson v. Gwynne*, 12 East, 381; see *Clipsham v. Vertue*, 5 Q. B. 265) is, that "unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but a distinct covenant, for the breach of which the party injured may be compensated in damages."

If the agreement be to pay so much per month, week, or other aliquot part of the voyage, the merchant takes the risk of its duration, and the freight will begin to run against him from the day the ship breaks ground, and continues to do so, not only while she is at sea, but during any unavoidable delay which does not suspend the contract; *ex. gr.* for repairs. *Havelock v. Geddes*, 10 East, 555. *Ripley v. Scaife*, 5 B. & C. 167. See *Beale v. Thompson*, 3 B. & P. 405. But if the agreement be in any other form the owner takes the risk of the duration of the voyage, and is only entitled to the same amount, however long it may continue. Sm. M. Law, 288.

Where by the charter-party freight is to be paid "subject to insurance," this does not amount to a condition precedent to the recovery of the freight, but merely means that the premiums of insurance are to be deducted from the freight. *Jackson v. Isaacson*, 3 H. & N. 405.

A charter-party provided that the ship, being "tight, staunch, and strong, and every way fitted for the voyage," should load a cargo at Sunderland, and therewith proceed to Constantinople, and that a portion of the freight should be advanced on the ship having sailed. The court held that the sailing of the ship in a seaworthy condition was made by the charter-party a condition precedent to the payment of the freight, and, consequently, that in an action for a portion of the freight, it was a good plea that at the commencement of the voyage the ship was not tight, staunch, &c., and that by reason thereof the ship and cargo were wholly lost. *Thompson v. Gillespy*, 5 E. & B. 209.

The owner has a lien on the goods until the freight is paid, if he do not agree to waive it, and have not framed his charter-party in such a manner as to part with the possession of the vessel to the charterer. See *Campion v. Colvin*, 3 Bing. N. C. 17. *Saville v. Campion*, 2 B. & A. 503. *Christie v. Lewis*, 2 B. & B. 410. In *Alsager v. St. Katherine's Dock Co.* 14 Mee. & W. 794, it was held that there was no lien for freight, it having been made payable "in cash, two months after the vessel's inward report," though another clause provided that the ship should deliver her cargo, "on being paid freight at 4*l.* per ton," and the charterer had become bankrupt. The owner may also sue the charterer on the contract to pay freight. *Tapley v. Martens*, 8 T. R. 451. *Christy v. Row*, 1 Taunt. 300. *Shephard v. De Bernales*. 13 East. 565.

If a ship, chartered at a *specific* sum for the voyage, without reference to the quantity of goods, were to lose part of her cargo, it has been doubted whether freight would be payable for the remainder. Malyne, *Lex. Merc.* p. 100. *Bright v. Cowper*, 1 Brownlow, 21. *Roberts v. Havelock*, 3 B. & Adol. 404. *Sinclair v. Bowles*, 9 B. & C. 92. But the hardship of the case would induce the court to construe such a charter-party as favourably as the strictness of law would permit, and if there were any circumstances whence it could be inferred—such, for instance, as an acceptance by the charterer of the remaining portion of the cargo—a new contract to pay freight *pro ratâ* might be held to arise by implication. *Mitchell v. Darthez*, 2 Bing. N. C. 555.

Where the ship, having performed part of

IV. Dissolution of Contract.

(A) *By Intervention of Hostilities.*[1]

her voyage, is disabled from completing the remainder, and the master has transhipped the goods, in order to carry them to their destination; if the goods be conveyed safely to their destination the freight paid shall be that originally contracted for. Thus, in *Shipton v. Thornton* (9 Ad. & E. 314), goods shipped on board the James Scott at Singapore, for London, under bills of lading to merchant, were under circumstances of necessity transhipped at Batavia into the Mountaineer and Sesostris, under bills of lading, to one Ellward or assigns. The goods arrived safe. Ellward indorsed the bills to merchant, and he received the goods. It was held that he was liable to the original freight as per James Scott, not to the freight as per James Scott to Batavia only, and then to the rates, which were smaller, as per Mountaineer and Sesostris; the court saying: "It may be taken to be either the duty or the right of the owner to transhipment. If it be the former, it must be so in virtue of his original contract, and it should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending the fulfilment. If it be the latter, a right to the full freight seems to be implied. The master is at liberty to transhipment, but for what purpose, except for that of earning his full freight, at the rate agreed on?" If the transhipment can only be effected at a higher than the original rate of freight, the opinion of the court appeared to be, that in such case the master's right to transhipment would be at an end, but that he would become the freighter's agent, to do what was most for his benefit under the circumstances, and that, consequently, if it were for the freighter's advantage that the goods should be forwarded, and an increased rate of freight incurred, the freighter would be bound by his agreement to pay such increased rate. If the merchant prefer receiving the goods where they are, he must pay freight *pro ratâ itineris peracti* (Malyne, 98. *Lutwidge v. Grey*, Abb. p. 3, c. 7, s. 13. The *Copenhagen*, 1 Rob. Am. R. 289), and this not on the original contract of affreightment, upon which the owner, if obliged to sue, must not proceed, but under a new one, which the law implies from the merchant's behaviour. *Luke v. Lyde*, 2 Burr. 882; 1 Black. 190. *Cook v. Jennings*, 7 T. R. 381. *Mulloy v. Backer*, 5 East, 316. *Mitchell v. Darthez*, 2 Bing. N. C. 555.

Where goods are transhipped at an intermediate port in consequence of the vessel becoming unseaworthy, the owner of the vessel in which they are so transhipped may, it has been supposed, have transferred to him the lien of the owners of the previous vessel, but he can have no greater lien for freight than the owner of the vessel in which they were originally shipped. *Matthews v. Gibbs*, 30 L. J. Q. B. 55; 7 Jur. N. S. 186.

If the master, being at too great a distance from the merchant to consult him, and acting for the best, direct a sale, having good grounds to believe it necessary, it was thought by some that there was no reason why an implied contract to pay freight *pro ratâ* should not arise on the merchants receiving the proceeds, as it certainly will where the goods are seized and sold by a competent prize court under a sentence which is afterwards reversed and the proceeds restored. *Baillie v. Mondighani*, Peake, c. 2, p. 70. The Court of Exchequer has, however, decided that no such contract arises. *Vlierborom v. Chapman*, 13 Mee. & W. 230. If the master sell without necessity, or refuse to forward the goods to their destination, no freight is due. *Hunter v. Prince*, 10 East, 378. *Liddard v. Lopes*, id. 526. *Osgood v. Groning*, 2 Camp. 466. As in the absence of express stipulation the voyage does not commence till the ship has broken ground, if she be prevented from sailing her owners are entitled to no compensation for work already done, such as loading the goods on board. *Curling v. Long*, 1 B. & P. 634. *See* further as to freight, *post*, Freight.

[1] By the breaking out of a war, or a local interdiction of commerce, arising subsequently to the making of the contract, between the state to which the ship or cargo belongs and that to which it is destined, the contract is considered to be dissolved, or at all events no damage can be recovered for its breach. *Esposito v. Bowden*, 7 E. & B. 763. See *Clemontson v. Blessig*, 11 Ex. 135. In *Reid v. Hoskins*, 4 E. & B. 979, 6 id. 953, the declaration was upon a charter-party between the plaintiff and the defendant, by which the defendant agreed to load a cargo on board the plaintiff's ship at Odessa; and it alleged that the defendant had made default. The plea stated, that before the breach of the contract war had been declared by England against Russia, and had since existed; of which both plaintiff and defendant had notice before any breach; that both the plaintiff and defendant were British subjects, and the ship was a registered British ship; that Odessa was part of the Russian empire, and that no license of the Queen could be obtained for loading the ship; and that the defendant could not have procured a cargo or loaded the ship without trading and corresponding with the enemy. The court held that the contract was dissolved before any breach of it by the defendant, and that he was entitled to judgment. *Reid v. Hoskins*, 4 E. & B. 979; 6 id. 953. See also *Avery v. Bowden*, 5 id. 714; 6 id. 953. *Barwick v. Buba*, 2 C. B. (N.S.) 563.

(B) *By Prohibition of Commerce.*[1]

(C) *Or Blockade.*[2]

V. Action upon.

(A) *Who must Sue.*[3]

CHEAT. *See* False Pretences; Forgery.

The contract is not, however, dissolved by an embargo, which is but a temporary suspension, not a total interdiction of commerce (*Hadly v. Clarke*, 8 T. R. 259), unless the embargo were intended as a hostile measure against the country to which the ship belongs, and the object of the voyage has been thereby lost. *Touteng v. Hubbard*, 3 B. & P. 291.

[1] If the exportation of the articles of which the cargo is to consist be prohibited, the contract of affreightment is dissolved. *Barker v. Hodgson*, 3 M. & S. 267. But such a prohibition by a foreign government is no excuse for the non-performance of an engagement to lade a vessel with a cargo of the goods, the exportation of which is prohibited, for one nation will not enforce the merely positive regulations of another, if inconsistent with its own. *Blight v. Page*, Abb. p. 3, c. 11; 3 B. & P. 295, n. a. See *Sjoerds v. Luscombe*, 16 East, 201.

[2] It is illegal, as contrary to the law of nations, to attempt to enter a blockaded port in violation of the blockade, and after a notification of such blockade the act of sailing with the intention of violating the blockade is illegal. *The Neptune*, 2 Rob. 110. *Medeiros v. Hill*, 8 Bing. 231. But the mere act of sailing to a port which is blockaded at the time the voyage is commenced, without any premeditated intention of breaking the blockade if it shall be found to continue in force when the ship arrives off the port, is not illegal (*Medeiros v. Hill, supra. The Shepherdess*, 5 Rob. 264. See *Nayler v. Taylor*, 9 B. & C. 718), for it may be of the first importance to neutral merchants to possess the opportunity of introducing their goods at the earliest moment after the blockade has been relaxed.

[3] Where no difficulty is created by any special description of the parties to the contract, and it is made in the name of a person who is really an agent, evidence is admissible, even although he is not described as an agent, to show the existence of the agency, so as to give the benefit of the contract to the unnamed principal, or to charge him with liability on it; but the agent cannot get rid of his liability on a contract which he has executed in this form, by showing that he was merely an agent in the transaction. Maude & P. on Shipping, 222, 2d ed.; 29 L. J. Q. B. 93. Where an agent described himself as "owner of the ship" in the charter-party, it was held that the real principal could not sue upon it (*Humble v. Hunter*, 12 Q. B. 310); but on the other hand, where the principal described himself as "agent," and the charter-party contained a stipulation that he should not be personally liable, he was held entitled to sue upon it as principal, and it was said that the stipulation applied to him only in the description or character of agent. *Schwaltz v. Avery*, 16 id. 655. And where a person was described in a charter-party as an agent, but signed it without any qualification, it was held that he was personally liable. *Parker v. Winlow*, 7 E. & B. 942.

A charter-party was entered into by merchants in London, who were mentioned in the body of the charter as if they were contracting parties, and they signed the charter "by authority of and as agents for" a merchant at Memel:—The court held that, notwithstanding, they were personally liable on the contract. *Lennard v. Robinson*, 5 E. & B. 125. But where agents bound themselves by the terms of the charter-party, without specifying that they were agents, but signed the contract in that character, and at the time the charter-party was entered into it was agreed that they should not be personally liable, and the other party knew that they were the agents of the person on whose behalf they professed to sign it, these facts were held to afford a good answer to an action against the agents on the charter-party. *Walter v. Harriss*, 7 Jur. N. S. 710; 9 W. R. 788.

In a charter-party it was agreed "between D. and Sons, owners of the ship A., of the one part; and G., Brothers, agents to F., of Anamaboo, merchants and charterers, of the other part, &c." throughout the charter-party the words "merchants and charterers" were printed in the plural without alteration. It was signed, "for D. and Son, of Jersey, owners; B., as agent for F. of Anamaboo; G., Brothers, agents:—the court held, that G., Brothers were not liable as principals. *Deslandes v. Gregory*, 29 L. J. Q. B. 93; 24 Jur. 651.

Where the charter-party provided that, being made by the defendant as agent for the charterer residing abroad, all liability of the defendant in every respect, as to all matters and things, as well before and during as after the shipping of the cargo, should cease as soon as he had shipped the cargo, the shipowner having sued the defendant for an unreasonable delay in loading the cargo:—It was held a good plea that the cargo was loaded and shipped, and the vessel cleared by the defendant at the Custom House before the commencement of the suit, and that thereupon all liability of the defendant, in respect of the said charter-party, had ceased. *Milvain v. Perez*, 36 L. J. Q. B. 90; 7 Jur. N. S. 336.

CHEAT at Common Law.

REGINA v. CLOSS, 27 L. J. M. C. 54.

The prisoner was indicted on a charge, set out in the indictment that he had sold to one Fitzpatrick a picture, as and for an original picture, painted by Linnell, when in point of fact it was only a copy ; and that he had passed it off by means of having the name "J. Linnell" painted in the corner of the picture, in imitation of the original, on which that name was painted by the painter.

Money obtained by means of a false mark or token, put on an article with a view to deception, is a cheat at common law, and an indictable offence.

Cockburn, C. J. "We have carefully examined the authorities, and the result is that we think that if a person, in the course of his trade or business, openly and publicly carried on, put a false mark or token upon an article, so as to pass it off as a genuine one, when in fact it is only a spurious one, and the article is sold, and money obtained by means of that false mark or token, that will be a cheat at common law. As, for instance, in the case, put by way of example during the argument, of a man who sold a gun with the mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer—that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment."[1]

CHEQUES.

See Bankers' Cheques, vol. ii. p. 119, *et seq.*; and *see* Bills and Notes, id. p. 400, *et seq.*

(A) *Obliterating or altering Crossing.*

Obliterating or altering crossing.

24 and 25 Vic. c. 98. s. 25. "Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines, with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off, any cheque or draft, whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." *See* Forgery ; Larceny.

CHILD, Abandoning or Exposing.

24 & 25 Vic. c. 100, s. 27. "Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."[2]

CHILD, Competency of to be a Witness.

R. v. BRASIER, 1 Leach, C. L. 199 ; 1 East, P. C. 443.

The admissibility of the testimony of a child of tender years depends on the intelligence and religious education of the child.[3]

The prisoner was indicted for an assault with intent to commit a rape on an infant under the age of seven years, who was not examined as a witness ; and the chief evidence for the prosecution was the account she had given of the transaction to two other persons. The prisoner was convicted.

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[1] See *Reg. v. Sharman*, 23 L. J. M. C. 51; 1 Dears. C. C. 285. *Albin's case*, Tremaine's P. C. 109. *Worrall's case*, id. 106; 2 Russ. Crimes, 282.

[2] The above enactment is new, and was rendered necessary by the decisions in *Reg. v. Cooper*, 1 Dears. C. C. 459; 2 C. & Kir. 876. *Reg. v. Hogan*, 1 Dears. C. C. 277. *Reg. v. Philpot*, id. 179.

[3] There is no age at which the credence of children is excluded on the ground that they have not sufficient understanding. Every person who has attained the age of fourteen is presumed to have ordinary un-

The Judges, having considered the case, held unanimously that the conviction was wrong—that "no testimony whatever can be legally received except upon oath, and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequence of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court, but if they are found incompetent to take an oath their testimony cannot be received."

CHILD, Concealment of Birth of.

24 & 25 Vic. c. 100, s. 60. "If any woman shall be delivered of a child, every person who shall by any secret disposition[1] of the dead body of such child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that, if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the court may pass sentence as if such person had been convicted upon an indictment for the concealment of the birth."

CHILD, Responsibility of, for Criminal Acts.[2]

4 Black. Com. p. 24. By the law as it now stands, and has stood at least ever since the time of Edward III., the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as

derstanding until the contrary appears; but there is no such presumption where the witness is under the age of fourteen, and therefore inquiry is made as to the degree of his understanding, and if he appear to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify whatever his age may be. But in *Pike's case* (3 C. & P. 598) *Mr. Justice Park* rejected the dying declaration of a child of four years of age, observing that, however precocious the mind might have been, it was quite impossible that she could have had that idea of a future state which was necessary to make dying declarations admissible.

As to the degree of intelligence required to render admissible the evidence of a child, no precise rule can be laid down. *Mr. Justice Patteson* rejected the evidence of a girl of eight years of age, where the only religious instructions he had ever received was imparted by a clergyman in two visits, made for the purpose of instructing her in the nature of an oath, with a view to the trial. *R. v. Williams*, 7 C. & P. 320. But in *R. v. Milton*, Ir. Cir. Rep. 61, *Doherty, C. J.*, admitted the evidence of a child, where the only religious instruction had been communicated after the perpetration of the offence, and with a view to render her a competent witness.

Hearsay evidence cannot be given of the declarations of a child who has not capacity to be sworn. *R. v. Brasier, supra* in text. *R. v. Nicholls*, 2 C. & Kir. 246. *R. v. Pike*, 3 C. & P. 598.

[1] These words, "secret disposition," are substituted for the words "by secret burying or otherwise disposing of the dead body," in the repealed statute—an expression on which various questions were raised. See *Reg. v. Snell*, 2 M. & Rob. 44. *Reg. v. Ash*, 2 M. & R. 294. *Rex v. Watkins*, 1 Russ. C. & M. 574. *Reg. v. Halton*, 2 M. & Rob. 294. *Reg. v. Goldthorpe*, 2 M. C. C. R. 242. *Reg. v. Perry*, 1 Dears. 471.

[2] *See* 1 Hale, 27; 1 Hawk. c. 1, s. 1; Plowd. 19; Fost. 349; Cowp. 222. After the age of fourteen years, the presumption is that all infants are *doli capaces*, and capable of discerning good from evil; and they are, with respect to their criminal actions, subject to the same rule of construction as those of more mature age.

much cunning as another of fourteen, and in these cases our maxim is, that *malitia supplet ætatem* under seven years of age: indeed, an infant cannot be guilty of felony; for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony. Also under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax*, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.

CHILD-STEALING, Offence of.

See Abduction, *ante*, vol. i. p. 45.

24 & 25 Vic. c. 100, s. 56. "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child; or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; and whosoever shall with any such intent receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and if a male under the age of sixteen years, with or without whipping: Provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or the taking such child out of the possession of any person having the lawful charge thereof." [1]

Doc. & Stu. c. 26; Co. Litt. 79; 1 Hawk. c. 1, n. 1. Between the age of seven and fourteen years an infant is deemed *primâ facie* to be *doli incapax*, but *malitia supplet ætatem*—malice supplies the want of mature years; and this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion: for the capacity of doing ill is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. 4 Bl. Com. 24; 1 Hale, 25. In such cases, however, the evidence of malice ought to be strong and clear beyond all doubt and contradiction. 4 Bl. Com. 24. Where a child between seven and fourteen years is indicted for felony, two questions ought to be left to the jury: first, whether he committed the offence; secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R. v. Owen*, 4 C. & P. 236. In the case of rape, an infant under fourteen years cannot, on the ground of presumed physical incapacity, be convicted of this offence; and the presumption of such incapacity cannot be rebutted by evidence. *R. v. Groombridge*, 7 C. & P. 582. *R. v. Jordan*, 9 id. 118. *R. v. Philips*, 8 id. 736. *R. v. Brimilow*, 9 id. 366. But he may be a principal in the second degree if he aid and assist in the commission of the offence, and it appear that he had a mischievous discretion, for the excuse of impotency will not in such a case apply. *Reg. v. Eldershaw*, 3 id. 396. See *Reg. v. Allen*, 1 Deac. C. C. 364.

In some misdemeanors and offences that are not capital, an infant is privileged by reason of his nonage, if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance, because laches shall not be imputed to him. 4 Bl. Com. 22; Co. Litt. 357. See *R. v. Sutton*, 3 Ad. & E. 597. *See post*, Infancy.

[1] Taking away a natural daughter out of the custody of her putative father is within the statute. See *R. v. Sweeting*, 1 East, P. C. 459. *R. v. Cornforth*, 2 Stra. 1162. The statute uses the words "by force or fraud," and it was even held under a statute, in which these words did not occur, that where the consent of the parents to the taking away of the child was obtained by false and fraudulent representations, it was an abduction within the statute. *Reg. v. Hopkins*, Car. & M. 254. It is no defence that the defendant did not know she was under fourteen, or might from her appearance have supposed that she was older. *Reg. v. Robins*, 1 C. & Kir. 456.

Where the prisoner having induced an unmarried girl under the age mentioned in the statute to leave her father's house, and meet him by appointment without her father's consent, and they cohabited three days and nights, and then parted by consent, and the girl returned home; the jury having found the prisoner guilty on an indictment for abduction, and that he took the girl away with him in order to gratify his passions, but not with the view of keeping her from her home permanently; it was held that there was sufficient evidence to warrant

CHIROGRAPHUM apud debitorem repertum præsumitur solutum. Where a bond, bill, or note is found in the possession of the debtor, there is a presumption that it has been paid. *See* 1 Tayl. Ev. 117. *Phillips v. Warren*, 14 Mee. & W. 379. The office of chirographer was abolished by 5 & 6 Wm. 4, c. 82, s. 1.

CHEMISTS.[1] *See* also Apothecary, vol. i. p. 376; *post*, Medical Practitioners.

CHLOROFORM: Administering with Intent.

24 & 25 Vic. c. 100, s. 22. "Whosoever shall unlawfully apply or administer to, or cause to be taken by, or attempt to apply or administer to or be taken by any other person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing an indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any other term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

CHOKE, Attempt to.

24 & 25 Vic. c. 100, s. 21. "Whosoever shall by any means whatsoever attempt to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

CHOSE in Action.

(A) *Definition of.*[2]

(B) *Transfer of.*[3]

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the conviction. *R. v. Timmins*, 30 L. J. M. C. 45. See *Reg. v. Robins*, 1 C. & Kir. 456. *Rex v. Twistleton*, 1 Lev. 257; 1 Sid. 387; 2 Keb. 32.

[1] The sec. 55, 21 & 22 Vic. c. 90, the act regulating the qualification of practitioners in medicine and surgery, expressly enacts, "Nothing in this act contained shall extend, or be construed to extend, to prejudice or in any way to affect the lawful occupation, trade, or business of chemists and druggists, and dentists, or the rights, privileges, or employments of duly licensed apothecaries in Ireland, so far as the same extend to selling, compounding, or dispensing medicines." *See* 30 L. J. M. C. 35, 56; 19 W. R. 41. The 55 Geo. 3, c. 194, ss. 28 & 29, did not apply to chemists, but chemists who acted as apothecaries were not exempt from the operations of that statute. *See* 1 Q. B. 799.

[2] A chose in action is a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action, and therefore termed a chose, or thing, in action. *See* Com. Dig. Biens; 2 Bl. Com. 396; 1 Chit. Gen. (Pr.) 99. A distinction exists between a deed or bill of exchange, or other security for a debt, or document affording evidence and security of a right, and the thing ultimately to be recovered, though in general both are denominated choses in action. The deed or writing, whether on parchment or paper, is itself, for some purposes, a chose in possession; but the money or damages thereby secured are strictly choses in action until reduced into possession. 1 Chit. Gen. (Pr.) 99.

[3] The transfer of a chose in action differs in form and effect from that of a personal thing in possession, for though in general the beneficial interest in a chose in action may be transferred by parol, and without writing, yet, with the exception of bills and notes, bail and replevin bonds, and a few other documents, the legal interest does not pass so as to enable the assignee of the interest to enforce payment or sue in his own name; and he must in general proceed in the name of the original proprietor. In order, also, to perfect the transfer even of the beneficial

(C) *Larceny of.*[1]

CHRISTIANITY.

Turning into Ridicule the Christian Religion is an Offence.[2]

interest, it is essential that the assignee or purchaser should give notice of the transfer to the debtor or other contracting party, for otherwise, in case of the bankruptcy of the transferor, the benefit of the intended transfer will be lost. *Williams v. Thorp*, 2 Sim. 257. *Deval v. Hall*, 3 Russ. 12. *See* 16 East, 36; 4 Taunt. 326.

Contracts for railway shares are choses in action. *Humble v. Mitchell*, 11 Ad. & E. 205; 2 Rail. Cas. 70; 3 Per. & D. 141. So an interest in a partnership being a chose in action is not assignable at law, so as to enable the assignee to sue as a partner, but it is a thing of value, and may be made the subject of a valid contract. *Tempest v. Kilner*, 3 D. & L. 407; 2 C. B. 300; 15 L. J. C. P. 10.

Where the holder of a ticket in the Derby lottery sold to plaintiff before the race, and the horse named in it was ultimately declared to be the winner:—*Held*, that the plaintiff could not sue the defendant (the shareholder) for money had and received for the amount to which the holder of the ticket was, by the conditions of the lottery, entitled, as the lottery-ticket, being a chose in action, was not assignable. *Jones v. Carter*, 8 Q. B. 134; 10 Jur. 33; 15 L. J. Q. B. 96.

A compensation granted to a public civil officer on the reduction of offices in his department, under the 4 & 5 Wm. 4 c. 24, is not assignable by him. *Wells v. Foster*, 8 Mee. & W. 149; 5 Jur. 464. See *Greenfell v. Windsor (Dean and Chapter)*, 2 Beav. 554. The assignee of a chose in action, or security of any kind, where there has been a fraud, stands in exactly the same situation as the assignor. He must be taken to be cognisant of them. It is his duty to make inquiries, and, as a general rule, the creator of the security thus assigned is not bound, on receiving simple notice of the assignment, to volunteer information. If a loss arises, it falls upon him whose duty it is to make inquiries, and who has not made them. *Mangles v. Dixon*, 3 H. L. Ca. 702. But if the notice given by the assignee disclose on the face of it that which induces the belief that he has been deceived in accepting the assignment, the creator of the security is bound to inform the assignee of the real circumstances, and if he should not do so, he will be bound to perform the stipulations of the security, and cannot be allowed to take advantage of the equities existing as between the assignor and himself. (Id.) The performance by the creator of a security of any intermediate stipulations in it after he has received notice of its assignment being an act done, under both a legal and equitable liability, can never in itself be considered as a ground for fixing him with a liability to something beyond that by which he is equitably bound. (Id.)

A purchaser of a chose in action takes it subject to all equities, and therefore, where A. mortgaged a fund in court to B., and after joined B. in a sub-mortgage to C., and it was decided that the mortgage to C. was fraudulent and void:—*Held*, that it was void also as to C., and that neither A.'s concurrence in the first or second mortgage prevented him from insisting on the invalidity of the transactions with B., he (A.) not being cognisant of his rights. *Cockell v. Taylor*, 15 Beav. 103; 21 L. J. C. P. 545.

Where a debtor deposits a title-deed with his creditor as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person. *Hobson v. Millward*, 2 M. & Rob. 342: *Rolfe*.

The Wills Act (1 Vic. c. 26) does not enable a testator to bequeath a chose in action so as to pass the right of suing to the legatee. *Bishop v. Curtis*, 17 Jur. 23; 21 L. J. Q. B. 391.

Where a party who is afterwards convicted of felony is entitled to a chose in action, the right of suing being in another in trust for him, that right of suit does not vest in the Crown upon the conviction. (Id.)

A debt or other chose in action may be assigned in equity, without any concurrence on the part of the debtor. *Bell v. London and North-Western Railway Co.* 15 Beav. 548.

[1] Choses in action were not the subject of larceny at common law, for they are of no intrinsic value. *Reg. v. Watts*, 1 Dears. C.C. 326. *Calye's case*, 8 Co. 33; 1 Hawk. c. 33, s. 5; but bonds, bills, and other valuable securities are rendered by statute the subject of larceny. *See post*, Larceny.

[2] Converting the Christian religion into contempt and ridicule is an indictable offence. *Taylor's case*, 1 Vent. 293; 3 Keb. 607. *See* 1 Hawk. P. C. b. 5; 1 East, P. C. 3; Wooddes, 512. Formerly it was only cognisable by the ecclesiastical courts, but now it is punishable in the civil courts by fine and imprisonment; and by the 9 & 10 Wm. 3, c. 32, it is enacted, that "if any person educated in, or having made profession of, the Christian religion, shall by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of Divine authority, he shall on the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail."

REX v. WOOLSTON, Barn. 162; 2 Stra. 834. S. P. REX v. BOSWORTH, 2 id. 1113.

To impugn in an indecorous manner the Christian religion is an offence.

The defendant was convicted for his blasphemous discourses on the miracles of our Saviour. On a motion in arrest of judgment, that this was not an offence within the cognisance of the temporal courts at common law, the court declared they would not suffer it to be debated, observing that the Christian religion, as established in this kingdom, is part of the law, and that, therefore, whoever derided Christianity derided the law, and consequently must be an offence against the law. In *Rex v. Woolston* it was also moved, in arrest of judgment, that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the court replied, that an attack on Christianity in the way in which it was attacked in the publication in question was destroying the very foundation of it, and therefore clearly an offence at law. But that the rule did not extend to disputes between learned men upon particular controverted points.[1] The defendant was fined and imprisoned.

CHRISTMAS-DAY. *See* Bills of Exchange, vol. ii. p. 400.

CHURCHES and CHAPELS. *See* Advowson, vol. i. p. 219; Burial, *ante*, p. 9; *post*, Church-Rates, p. 109; Churchwardens, p. 114; Induction; Parish; Pews; Vestry.

I. As to CHURCHES, p. 101.

(A) *Relative to the Manner of Founding*, p. 101.
(B) „ *Building of Churches, &c. in England and Ireland*, p. 101.
(C) „ *Consecration*, p. 101.
(D) „ *Chancel*, p. 102.
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(F) „ *Fitting-up and Ornaments of the Church*, p. 102.
(G) „ *Freehold of the Church*, p. 105.
(H) „ *Union of Churches.* See vol. i. p. 225, et seq.

[1] Provided the opinions are rationally and dispassionately expressed. *See* 4 Bl. Com. 51. And in the case of *Rex v. Williams*, cited Holt on Libel, 69, n., where the defendant had been convicted of having published a very impious libel called *Paine's Age of Reason*, *Ashhurst, J.*, in pronouncing judgment, said, that although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishments. If anti-Christian publications be seised under an execution, the court will not direct their sale. 1 D. & R. 474. It is immaterial whether the publication be oral or written. 2 Stark. St. 141.

The following are the cases on the subject:—*R. v. Attwood*, Cro. Jac. 421. *R. v. Taylor*, Vent. 293. *R. v. Clendon*, 2 Stra. 870. *R. v. Hales*, id. 816. *R. v. Annett*, 2 Burn's Ec. L. 781. *R. v. Wilkes*, 2 Stark. St. 141. *R. v. Williams*, id. *R. v. Eaton*, id. 142. *R. v. Carlisle*, 3 B. & A. 161. *R. v. Waddington*, 1 B. & C. 26. *R. v. Taylor*, 2 Stark. St. 143. The statutes relating to blasphemy, which do not, however, alter the common law (*R. v. Waddington*, 1 B. & C. 26) are, 1 Edw. 6, c. 1; 1 Eliz. c. 2; 12 id. c. 12; 3 Jac. 1, c. 21, s. 9; 9 & 10 Wm. 3, c. 32; 53 Geo. 3, c. 160; 20 & 21 Vic. c. 83.

(I) *Relative to the Celebration of Marriages.* See *post*, Marriage.
(J) „ *Ringing the Bells*, p. 105.
(K) „ *Repairs*, p. 106.
(L) „ *Profaneness in the Church*, p. 107.
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(N) „ *Nonconformity to the Worship of the Church*, p. 108.

II. As to Chapels, p. 108.
(A) *Relative to Private Chapels*, p. 108.
(B) „ *Free Chapels*, p. 108.
(C) „ *Chapels of Ease*, p. 109.
(D) „ *the Repairs*, p. 109.

I. As to Churches.[1]

(A) *Relative to the Manner of Founding.*[2]

(B) „ *Building Churches, &c. in England and Ireland.*

See 58 Geo. 3, c. 45; 59 id. c. 134; 3 Geo. 4, c. 72; 5 id. c. 103; 6 & 7 Vic. c. 37; 7 & 8 id. c. 94; 19 & 20 id. c. 104.

(C) *Relative to the Consecration.*[3]

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[1] A church is a temple or building consecrated to the honour of God and religion; these edifices were anciently dedicated to some saint, whose name they bore. Or a church may be defined to be an assembly of persons united by the profession of the same Christian faith, met together for religious worship. A church, to be adjudged such in law, must have administration of the sacraments and sepulture annexed to it. If the king founds a place of this description, he may exempt it from the ordinary's jurisdiction; but it is otherwise in case of a subject. Such an edifice is either major, as a cathedral, or minor, as a parish church. *See* Lind. 9. The cathedral is the see of the bishop —*leges episcopi* (*see* 2 And. 168), and cannot be conveyed to another without the bishop. *See* id. About the year 700, the Saxons in large districts founded churches for themselves and their tenants, which were the original of parish churches. Lel. de Dei, 259, s. 9, s. 4. Within those districts other churches were afterwards erected, which in process of time have obtained tithes, burial, and baptism, and thereby become parish churches. Id. 262, c. 9, s. 4. And, therefore, every church having burial, baptism, and tithes, is now esteemed a parish church. Id. 265, c. 9, s. 4.

[2] The ancient manner of erecting churches was, for the founders to make an application to the bishop of the diocese, and obtain his license. The bishop, or his commissioners, having set up a cross, the founders were allowed to proceed in the building of the edifice; and, when finished, the bishop consecrated it, but not till it was endowed, and before which the sacraments were not to be administered. *See* Degge, part i. c. 12. But by the common law, although these preliminary applications were usual, any person being a good Christian may build a church without license from the bishop, provided it be not prejudicial to any ancient church; though the law takes no notice of it as a sacred building till consecrated by the bishop, which is the reason why church or no church, &c. is to be tried and certified by the bishop. And in some cases, though a church has been consecrated, it must be reconsecrated, as in case any murder, adultery, or fornication be committed in it, whereby it is defiled; or if the church be destroyed, &c.

The usual manner now of erecting churches is by act of parliament, appointing commissioners, who superintend the building, &c. and are authorised to raise money for the purpose, in the mode directed by the particular act. *See* 58 Geo. 3, c. 45; 58 id. c. 134; 3 Geo. 4, c. 72; 5 id. c. 103; 6 & 7 Vic. c. 37; 7 & 8 id. c. 94; 19 & 20 id. c. 104. *See* 28 L. J. Q. B. 77.

[3] The law does not recognise churches or chapels till they are consecrated by the bishop; but the canon law supposes that, with consent of the bishop, divine service may be performed and sacraments administered in churches and chapels not consecrated; inasmuch as it provides that a church shall have the privilege of immunity in which the divine mysteries are celebrated, although it be not yet consecrated; and there are many licenses to that effect (granted on special occasions), in our ecclesiastical records. Gibs. 190. After a new

(D) *Relative to the Chancel.*[1]
(E) „ *Aisle.*[2]
(F) „ *Fitting-up and Ornaments of the Church.*[3]

church is erected, it cannot be consecrated without a competent endowment. The 16th canon of the Council of London directs that a church shall not be consecrated until necessary provision be made for the priest; and the canon goes further, requiring the endowment not only to be made before consecration, but even to be ascertained and exhibited before the founders begin to build. And the civil law is yet more strict, enjoining, that the endowment be actually made before the building be commenced. Gibs. 189. These endowments were commonly made by an allotment of manse and glebe by the lord of the manor, who thereby became patron of the church. *See* Ken. Par. Ant. 222, 223. Legacy to build is subject to legacy duty, 29 L. J. Ex. 66.

The consecration of churches may be performed indifferently on any day, for it has been done on a Saturday (Gibs. 189), though it ought to be performed during the time of divine service. (Id.)

Every bishop may exercise his own discretion as to the mode of consecrating churches and chapels. And by the 21 Hen. 8, c. 13, limiting the number of chaplains, it is there assigned as a reason why a bishop may retain six chaplains, because that number are requisite in the consecration.

[1] *The Chancel of a Church.*—This is part of the choir between the altar and the communion-table, and the rail or balustrade that encloses the place where the minister stands at the celebration of the communion. The chancel is also the eastern part of the church, where the altar is placed. Gibs. 299. The freehold of the chancel is in the rector or impropriator, and the burden of repairing it is cast upon him, as the burden of repairing the body of the church is cast upon the parishioners. Previously to the act for the dissolution of monasteries, the rector could not have alienated any part of the chancel or church without the consent of the ordinary. In the act 31 Hen. 8, c. 13, s. 4, there is a saving clause, leaving the right as it existed before, and the chancel, therefore, is still inalienable by the rector, and consequently a grant by a lay-impropriator of part of the chancel to A., his heirs and assigns, is not valid in law: for if the rector might convey in this way to one, he might to fifty persons: it might even enable him to desecrate this part of the church, where particular parts of the service are required to be performed. And it is not consistent with the duty as well of the ordinary as the rector to alienate any part of the chancel in this manner. *Clifford v. Wicks*, 1 B. & A. 498. A lay-rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary; for although the freehold of the chancel may be in the rector as by a sort of legal fiction, the freehold of the church is in the incumbent: yet the use of it belongs to the parishioners for the celebration of the communion and the solemnisation of marriage. *Rich v. Bushnell*, 4 Hagg. 164. For as concerns the body of the church the ordinary is to place and displace: in the chancel, the freehold is in the parson, and is parcel of his glebe. *See* Bro. & Goldsb. Rep. 45; 1 T. R. 428; 12 Co. 105; 2 Roll. Rep. 139; Cro. Jac. 604; 2 Keb. 92; 1 Sid. 88, 361; Rep. 45; 2 Bulst. 352; 2 Mod. 257; 5 T. R. 298; 1 Phill. Rep. 316; Gibs. *Codex*, 221, 224; 31 Hen. 8, c. 13, s. 4.

[2] The word "aisle" is derived from the term *nave* or *naf*, a Saxon expression signifying the middle of a wheel, being that part into which the spokes are fixed, and is from thence transferred to signify the body or middle part of the church.

An aisle in a church which has time out of mind belonged to a particular house, and been maintained and repaired by the owner of such dwelling-house, is part of his frank tenement; and the ordinary cannot dispose of it, or intermeddle in it. The reason for this rule is the prescriptive liability to repair, because it is from thence presumed that the aisle was erected by the possessor of the estate, with the assent of the parson, patron, and ordinary. *See* 12 Co. 105; Gibs. 197. But if he has only used to sit and bury in the aisle, and not repaired it, he gains no property therein; for it is then repaired at the charge of the parish, and vests in the ordinary. Gibs. 197. Nor can a title be obtained, either by prescription or by a grant from the ordinary, to a man and his heirs, since the aisle is always supposed to be held in respect of the house. *See* 12 Co. 106; 2 Keb. 92; 2 Buls. 1150; 1 Sid. 88. And when any person has a good title to the aisle, if the ordinary wrongfully place another therein, he subjects himself to an action on the case. *See* Wats. c. 39.

[3] By 1 Eliz. c. 2, such ornaments of the church, and of the ministers thereof, shall be retained and be used, as was in the church of England, by authority of parliament, in the second year of the reign of king Edward the Sixth, until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners, appointed and authorised under the great seal of England, for causes ecclesiastical, or of the metropolitan of this realm. Sec. 25. Pursuant to this clause, the queen, in the third year of her reign, granted a commission to the archbishop and bishop of London, Dr. Bill and Dr. Haddon, to reform the disorders of chancels, and to add to the ornaments of them, by ordering the commandments to be placed at the east end. Gibs. 201. Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained, and be

in use, as were in this church of England, by authority of parliament, in the second year of the reign of king Edward the Sixth. The archdeacons shall take care that the clothes of the altar be decent and in good order; that the church have fit books both for singing and reading, and at least two sacerdotal vestments. Lind. 52. The law allows the ecclesiastical court to have conusance, in this case, of providing decent ornaments for the celebration of divine service. 2 Inst. 489. And by 3 can. 85, the churchwardens or questmen shall take care that all things in the church be kept in such an orderly and decent sort, without dust, or anything that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect.

As to the Communion-Table.—By the 82d canon,—"Whereas we have no doubt but that in all churches within the realm of England convenient and decent tables are provided and placed for the celebration of the holy communion; we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place (if any question be made of it), and with a fair linen cloth at the time of the ministration, as becomes that table, and so stand, saving when the said holy communion is to be administered. At which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number may communicate with the said minister. And also this to be done at the charge of the parish." The communion-table may be removed by a majority of the parishioners in vestry, since the majority bind the parish. *Newson v. Bawldry*, 7 Mod. Rep. 70; S. C. Sett. & Rem. 259.

As to the Pulpit.—Formerly the bishops preached standing upon the steps of the altar. *See* Ayl. Par. 21. Afterwards it was found more convenient to have pulpits erected for that purpose. (Id.) And by the 83d canon the churchwardens or questmen, at the common charge of the parishioners, in every church shall provide a decent pulpit, to be set in a convenient place within the same, under the direction of the ordinary of the place.

As to the Reading-Desk.—By the 82d canon a convenient seat shall be made at the charge of the parish for the minister to read service in.

As to the Surplice.—The 58th canon directs every minister saying the public prayers, or ministering the sacraments or other rites of the church, to wear a decent surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter or decency thereof, the same to be decided by the ordinary.

As to the Font.—The 81st canon appoints that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual place. In which font only the minister shall baptize publicly.

As to the Chest for Alms.—In an act passed in the 27th Hen. 8, for punishment of sturdy vagabonds, it was enacted, that money collected for the poor should be kept in the common coffer, or box, standing in the church of every parish. And by the 84th canon the churchwardens "shall provide and have, within three months after the publishing of these constitutions, a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish (if there be none such already provided), having three keys: of which one shall remain in the custody of the parson, vicar, or curate, and the other two in the custody of the churchwardens for the time being; which chest they shall set and fasten in the most convenient place, to the intent the parishioners may put into it their alms for their poor neighbours. And the parson, vicar, or curate, shall diligently, from time to time, and especially when men make their testaments, call upon, exhort, and move their neighbours, to confer and give, as they may well spare, to the said chest, declaring unto them, that whereas heretofore they have been diligent to bestow much substance otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleases God; and that also, whatsoever is given for their comfort, is given to Christ himself, and is so accepted of Him, that He will mercifully reward the same. The which alms and devotion of the people the keepers of the keys shall yearly, quarterly, or oftener (as need requires), take out of the chest, and distribute the same in the presence of the most of the parish, or of six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours."

As to the Basin for Offertory.—Whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin, to be provided by the parish for that purpose.

This offertory was anciently an oblation for the use of the priest, but at the Reformation it was changed into alms for the poor. *See* Ayl. Par. 394.

As to the Chalice and other Vessels for the Communion.—By the 20th canon, "the churchwarden, against the time of every communion, shall, at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine bread, and of good and wholesome wine, which wine we require to be brought to the communion-table in a clean and sweet standing pot, or stoop of pewter, if not of purer metal."

The parishioners shall find at their own charge the *chalice* or *cup* for the wine (*see* Lind. 252); which, although expressed in

the singular number, is not intended to exclude more than one where more are necessary. *See* Lind. 252.

As to the Bells.—The parishioners, at their own charge, shall find bells and ropes. *See* Lind. 252.

As to the Bier.—The parishioners shall find, at their own charge, a bier for the dead. *See* Lind. 252.

As to the Bible and Prayer-Book.—By the 80th canon, the churchwardens shall provide a Bible of the largest size, at the charge of the parish. *See* Gibs. 202. And, by the same canon, the churchwardens or questmen of every church and chapel shall, at the charge of the parish, provide the Book of Common Prayer, lately explained on some few points by his majesty's authority, according to the laws and his majesty's prerogative on that behalf, and that with all convenient speed, but at the farthest within two months after the publishing of these our constitutions, on pain of 3*l.* a-month for so long time as they shall be unprovided. The penalties are imposed by the 13 & 14 Car. 2, c. 4, s. 2.

As to the Books of Homilies.—By the 80th canon, the churchwardens shall provide the Book of Homilies at the charge of the parish.

As to the Register-Book.—By canon 17, in every parish church and chapel shall be provided one parchment book, at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial within the parish; and, for the safe-keeping thereof, the churchwardens, at the charge of the parish, shall provide one sure coffer, with three locks and keys, whereof one is to remain with the minister, and the other two with the churchwardens severally. And by the 26 Geo. 2, c. 33, the churchwardens shall provide proper books of vellum, or good and durable paper, in which all marriages and bans of marriage respectively there published or solemnised shall be registered, to be carefully kept and preserved for public use.

As to the Table of Degrees.—By the 99th canon, the table of degrees of marriages prohibited shall be in every church publicly set up, at the charge of the parish.

As to the Ten Commandments.—By the 99th canon, the ten commandments shall be set, at the charge of the parish, on the east end of every church and chapel, where the people may best see and read the same.

As to Vaults and Monuments. (*See* Burial; Monument.)—A vault cannot be granted by parol so as to bind the grantor or rector; and it seems the rector has no power to make the grant at all. *Bryan v. Whistler*, 8 B. & C. 288; 2 M. & R. 318. Where the plaintiff's vault was supported by the defendant's adjoining wall, held, that an action was maintainable for negligently removing the wall. *Frower v. Chatwick*, 3 Bing. N. S. 334; 3 Scott 699.

The defacing of monuments is punishable at common law. And by the 24 & 25 Vic. c. 97, s. 36, the unlawful and malicious destruction or damage of any statue, monument, or other memorial of the dead, in any church, chapel, meeting-house, or other place of divine worship, or in any churchyard or burial-ground, is declared to be a misdemeanor, punishable with imprisonment not exceeding six months, with or without hard labour. The property in grave-stones, winding-sheets, coats of arms, pennons, or other ensigns, placed or hung up in memory of the dead, remains in the executors, who may have actions against those who break, deface, or carry them away—a right which is reserved by the above statute of the 24 & 25 Vic. c. 97, s. 36. *See* Co. Litt. 186; Cro. Jac. 367; 3 Inst. 110. If they were put up without the ordinary's consent, he may remove them. *Palmer v. the Bishop of Exeter*, 1 Stra. 576. And it seems the executors may have an action for defacing a monument. Godbolt, 276; 1 Burn. Ecc. L. 373. *See ante*, Burial.

After a man's return from transportation he may maintain trespass for injury done to a tombstone erected by his wife during his absence. *Spooner v. Brewster*, 2 C. & P. 34.

Inscriptions on tombstones inviting to pray for the soul, &c., held not contrary to the Articles or discipline of the Church of England; and in a libel containing an article for erecting such, without the consent of the incumbent first had, which was not contained in the original citation, as a distinct and ecclesiastical offence, held that the article was inadmissible. *Brooks v. Woolfrey*, 1 Curt. (Arches), 880.

As to Images.—If any images in a window or an aisle be unlawfully broken, the offender shall be punished. *See* Cro. Jac. 366.

There are many articles for which no express provision is made by any general law, and which, therefore, must be referred to the general power of the churchwardens, with the consent of the parishioners, or under the direction of the ordinary. 1 Burn. Ecc. L. 374. The consent of the parishioners is not, however, indispensable, unless to charge the parish with new ornaments, or for their support after they have been put up. Where no charge is incurred their consent is not necessary, neither is their disapprobation binding on the ordinary. *St. John's, Margate*, 1 Hagg. R. 198. *Butterworth v. Walker*, 3 Burr. 1689.

As to the Organ.—In cathedrals, organs may be deemed necessary, and the ordinary may compel their erection by the dean and chapter. In parish churches it is otherwise, and it may be proper to discourage them in some particular cases. In one case *Lord Stowell* decreed a faculty for accepting and erecting an organ offered to a parish church, without a clause against future expenses being charged to the parish, which was rich and populous. *Jay v. Webber*, 3 Hagg. R. 8. *St. John's, Margate*, 1 Hagg. R. 198. A parish will not be compelled by *mandamus* to elect an organist. *Ex-parte Le Crew*, 1 D. & L. 571.

The consent of the parish is not essentially necessary to the ordinary's setting up

(G) *Relative to the Freehold of the Church.*[1]
(H) „ *Union of Churches.* *See* Advowson, vol. i. p. 225, *et seq.*
(I) „ *Celebration of Marriages.* *See post*, Marriage.
(J) „ *Ringing the Bells.*[2]

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an organ. *Butterworth v. Walker*, 3 Burr. 1689.

In the case of *the Churchwardens of St. John's, Margate, v. the Parish, Vicar, &c.*, of the same (1 Hagg. 198), *Lord Stowell* declared that the law respecting church ornaments is now generally understood. The consent of the parishioners is not indispensably necessary, unless to charge the parish with the support of the ornaments. But if there is no charge incurred the approbation of the majority of the parishioners is not necessary, nor their disapprobation binding on the ordinary. He, therefore, decreed a faculty for erecting and accepting an organ offered to the parish, without a clause against future expenses being charged to the parish. And he further observed, "in cathedrals, organs may be deemed necessary, and the ordinary may compel their erection by the dean and chapter. In the parish churches it is otherwise."

As to the Question in whom the Property in the Ornaments vests.—In *Starky v. the Churchwardens of Watlington*, 2 Salk. 547, it was held that the property in chattels in the church vests in the churchwardens. Therefore, if a man erect a pew in a church, or hang up a bell in the steeple, they thereby become church goods (though they are not expressly given to the church), and he cannot afterwards remove them; and if he does, the churchwardens may sue him. The minister has, in the first instance, the right to the key of the church, and the churchwardens have only the custody under him. *Lee v. Mathews*, 3 Hagg. (Arches), 169.

The property of the bell-ropes in a parish church is in the churchwardens. *Jackson v. Adams*, 2 Bing. N. S. 402; 2 Scott, 599.

The soil and freehold of the church and churchyard is in the parson; but the fee-simple of the glebe is in abeyance. 1 Inst. 341. And if the walls, windows, or doors of the church be broken by any person, or the trees in the churchyard be cut down, or grass there be eaten up by a stranger, the incumbent of the rectory (or his tenant if they be let) may have an action for damages. Wats. c. 39. But the goods of the church do not belong to the incumbent, but to the parishioners; and if they be taken away, or broken, the right of action is vested in the churchwardens. (Id.) As in the case of Bucksal, id. And it is there said, that the suit for such an aggression shall not be in the spiritual court; but a later judgment (E. 18, c. 12) says, that though the churchwardens had an action at common law against those that had taken away the bells, yet the more proper remedy was in the spiritual court, because at the common law only damages would be recovered, but the spiritual court would decree the restoring of the thing itself. 1 Roll. Rep. 57; 1 Sid. 281; Gibs. 206.

By the civil law, the goods belonging to a church are forbidden to be alienated or pawned, unless for the redemption of captives, for the relief of the poor in time of great famine and want, or for paying the debts of the church, if a supply cannot otherwise be raised; or upon other cases of necessity or great advantage to the church. And in every alienation the cause must be first examined, and the decree of the prelate intervene, with the consent of the whole clergy or chapter (Wood. Civ. L. 142); but by the laws of England, the goods belonging to a church may be aliened, yet the churchwardens cannot dispose of them without the consent of the parish; and a gift of such goods by them, without the consent of the sidesmen or vestry, is void. Wats. c. 39.

[1] The *soil* and *freehold* of the church and churchyard belong to the parson (*see* 2 Cro. 367); he alone, therefore, may grant a license for burying in the church (*see* id. 237; Noy. 104); and make a lease of the church (*see* 2 Rol. 337). So he is entitled to the trees growing in the churchyard for the repair of the church. But the *possession* of the church is in the minister and churchwardens, and no one can enter it when not open for divine service except with their permission: hence it was holden, where the lessee of the great tithes had broken open the church, and erected pews, that the offence was cognisable in the ecclesiastical courts. *See* 3 Phill. Rep. 167. *See* Burial.

An indictment on the 4 Geo. 2, c. 32, for stealing in a church is good, without stating in whom the property or the freehold of the church is vested; and if the ownership be improperly laid, it may be rejected as surplusage. *Rex v. Hickman*, 1 Leach, C. L. 593; 2 East, P. C. 593. *Ex-parte Parker*, 1 Leach, C. L. *See* 1 Hale, 512; 3 Campb. 264; 2 East, P. C. 651.

[2] By the 88th canon the churchwardens or questmen, and their assistants, shall not suffer the bells to be rung superstitiously upon holidays, or eves abrogated by the Book of Common Prayer, nor at any other times, without good cause, to be allowed by the minister of the place, and by themselves. By can. 111 the churchwardens shall present all persons, who by untimely ringing of bells do hinder the minister or preacher. By can. 15, upon Wednesdays and Fridays, weekly, the minister, at the accustomed hours of service, shall resort to the church or chapel; and, warning being given to the people by tolling of a bell, shall say the Litany. And by can. 67, when any is pass-

(K) *Relative to the Repairs.*

BALL v. CROSS, 1 Salk. 164 ; Holt, 138. BROWN v. PALFRY, 2 Lev. 102. WISE v. CREEKE, id. 186.

The inhabitants of a chapelry, as well as the parishioners, are liable to repair the church, unless exempt by special custom.[1]

The inhabitants of a chapelry within a parish were prosecuted in the Ecclesiastical Court for not paying towards the repairs of the parish church ; and the case was, those of the chapelry had never contributed, but always buried in the mother-church, till, about Henry the Eighth's time, the bishop was prevailed on to consecrate them a burial-place, in consequence of which they agreed to pay towards the repair of the mother-church.

And *Holt, C. J.*, held, that by common law the parishioners of every parish are bound to repair the church, but by the canon law the parson is obliged to do it. In London the parishioners repair both church and chancel, though the

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ing out of this life a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death (if it so fall out) there shall be rung no more than one short peal, and one other before the burial, and one other after the burial.

[1] And the same rule applies to the occupier of lands in the parish, though he be not resident there. *Woodward v. Makepeace*, 1 Salk. 164. But no person shall be charged to repair a church in respect of land which he has in another parish (*Anon.* 4 Mod. 148); nor in respect of a lighthouse. *Rebow v. Bickerton*, Bunb. 81. And the parson is bound to repair the chancel of the church, unless there be a custom to the contrary. *Price v. Rouse*, 12 Mod. Rep. 83. Repairing of the chancel is a discharge from contributing to the repairs of the church. *See* 2 Roll. Rep. 211; 2 Keb. 730; Gibs. 199. But the repairing of a chapel of ease affords no exemption from the repairs of the church. *See* 2 Roll. Abr. 289.

It is said that the spiritual court may grant a sequestration upon an impropriate parsonage for not repairing the chancel (*Anon.* 3 Keb. 829), because impropriate rectors are bound of common right to repair the chancel. This doctrine is clear and uncontested; the only difficulty has been in what manner they shall be compelled to do it; whether by spiritual censures only, in like manner as the parishioners are compelled to contribute to the repairs of the church, since impropriations are now become lay fees; or whether by sequestrations (as incumbents, and, as it should seem, spiritual impropriators of all kinds, may be compelled). Gibs. 199. This doctrine seems to have been doubted. *Anon.* 2 Vent. 35; 1 Mod. 258; 2 id. 254; 1 Freem. 230.

As to who can Enforce the Repairs.— The archdeacons and their officials are enjoined, that in the visitation of churches they have a diligent regard to the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind they shall limit a certain time, under a penalty, within which they shall be repaired. Also they shall inquire by themselves, or their officials, in the parishes where they visit, if there be aught in things or persons which want to be corrected; and if they shall find any such they shall correct the same, either then or in the next chapter. *See* Lind. 53. Where the penalty is not limited, the same is arbitrary, but this cannot intend the penalty of excommunication, inasmuch as it concerns the parishioners *ut universos*, as a body or whole society, who are bound to the fabric of the body of the church; for the pain of excommunication is not inflicted upon a whole body together, although it may be inflicted upon every person severally who shall be culpable. And the same may be observed as to the penalty of suspension, which cannot fall upon the parishioners as a community or collective body. Yet the archdeacon in this case, if the effect be enormous, may enjoin a penalty, that after the limited time shall be expired divine service shall not be performed in the church until competent reparation shall be made, so that the parishioners may be punished by suspension or interdict of the place. But if there are any particular persons who are bound to contribute towards the repair, and although they be able, are not willing, or do neglect the same, such may be compelled by a monition to such contribution, under pain of excommunication, that so the church may not continue for a long time unrepaired through their default. Lind. 53. But, according to the modern practice, churchwardens have the special charge of the repairs of the church. And it seems now that the process shall issue against the churchwardens, and they may be excommunicated for disobedience.

The spiritual court may, by excommunication, compel the parishioners to repair the church; and when a vestry have made a rate for that purpose may enforce the payment of it. *Rogers v. Davenant*, 1 Mod. Rep. 194. *See* Excommunication, and 53 Geo. 3, c. 127.

A parishioner who merely attends a vestry when orders are given to repair a church is not liable for contribution in the absence of an express contract. *Lanchester v. Frewer*, 2 Bing. 361; 1 Bing. 201. An order by one churchwarden to repair does not render the others liable. *Northwaite v. Bennett*, 2 C. & M. 316. *See* 11 Moore, 398; 3 C. & P. 571.

freehold is in the parson, and it is part of his glebe, for which he may bring an ejectment.

In the principal case those of a chapelry may prescribe to be exempt from repairing the mother-church, as where it buries and christens within itself, and has never contributed to the mother-church; for in that case it shall be intended coeval, and not a latter erection in case of those of the chapelry: but here it appears that the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother-church till Henry the Eighth's time, and then undertook to contribute to the repairs of the mother-church. *See* 2 Roll. Abr. 290, l. 22; Hob. 67.

If two churches be united, the repairs of the several edifices shall be made as they were before the union. *See* Degge, p. 1, c. 12.

(L) *Relative to Profaneness in the Church.*[1]

(M) „ *the Churchway.*[2]

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[1] *By making an Arrest.*—Arrests in churches and churchyards are expressly interdicted by the 50 Edw. 3, c. 5, and 1 Rich. 2, c. 15; and though the arrest under such circumstances would not be void, the party may be indicted. *See* Cro. Eliz. 654; Cro. Car. 602; 29 Car. 2, c. 7; Petersdorff on Bail, 128.

By holding Fairs and Markets.—By the 13 Edw. 1, st. Wynton, c. 6, it is commanded from henceforth, neither fairs nor markets be kept in churchyards nor churches. *See* Athen. 137.

By holding Temporal Courts.—No temporal courts, leets, nor lay-juries, are to be holden in church, chapel, nor churchyard. *See* Lind. 270.

By holding Plays.—By the 88th canon, no plays are to be kept in the church, chapel, or churchyard. *See* Gibs. 191.

By having Feasts.—By the 88th canon, the churchwardens or questmen shall suffer no feasts, banquets, suppers, church ales, drinkings, or any other profane usage, to be kept in the church, chapel, or churchyard.

By having Musters.—By the 88th canon, the churchwardens or questmen, and their assistants, shall suffer no muster to be kept in the church, chapel, or churchyard.

By Brawling.—*See ante*, Brawling.

By Disturbing the Congregation during Divine Service.—Any person, though not a constable or churchwarden, may prevent a person disturbing a congregation while the minister is performing the burial service. *Glever v. Hynde*, 1 Mod. 168. *See* 1 Stra. 688; 1 Hawk. P. C. 271; 12 Mod. 610; 1 Ld. Raym. 62; 1 Saund. 13. But a battery, it is said, cannot be justified by removing a party from church, unless the party be a churchwarden. *Cockruft v. Eandem*, Comb. 17. And the latter may justify taking off a person's hat during divine service. *Hawe v. Planner*, 1 Saund. 13. Meeting tumultuously at a place of worship is a breach of the peace. *Rex v. Blisset and another*, 1 Mod. Rep. 13; 2 Keb. 558.

[2] The right to a churchway may be claimed and maintained by libel in the spiritual court. *See* Ayl. Par. 438; Gibs. 293. Such an easement is commonly claimed as a private way; and on suggestion that it is a highway, a prohibition will be granted. *See* Gibs. 293; 2 Roll. Abr. 287; Ayl. Par. 438.

A way to a parish church, or to the common fields of a town, or to a village which terminates there, may be called a private way, because it belongs not to all the king's subjects, but to the particular inhabitants of such parish, house, or village, each of which, as it seems, may have an action for a nuisance therein; whereas nuisances in highways are punishable by indictment, and are not actionable, unless they cause a special damage to some particular person. 3 Bac. Abr. Highways, A. If a way leading to a church be a private way, he who ought to repair may be compelled to repair by the Ecclesiastical Court, and no prohibition will lie; but otherwise if it be a highway, though it lead to a church. March. 45. If it be a highway, that is, common to all her majesty's subjects, the charge of repairing it, of common right, lies on the occupiers of lands within the parish, but may be cast on certain persons by reason of inclosure, tenure, or prescription; and in some cases is to be regulated by the surveyors appointed under the highway acts. *See* 3 Bac. Abr. 493, 494.

Persons of the Established Church, who absent themselves from divine worship through total irreligion, and attend the service of no other persuasion, by the 1 Eliz. c. 2; 23 id. c. 1; and 3 Jac. 1, c. 4; forfeit 1*s.* to the poor every Lord's day they so absent themselves, and 20*l.* to the king if they continue such default for a month. And if they keep any inmate thus irreligiously disposed in their houses, they forfeit 10*l.* per month; and this is still an indictable offence, though prosecutions by indictment are unfrequent. *See* the statute and cases, 1 East, P. C. 10; 23 Hawk. b. 1, c. 10; Bac. Ab. Heresy, D; Burn, J. & Dick, J., Lord's day; Williams, J. Sabbath. The stat. 29 Eliz. c. 6, s. 6, provides, that the indictment need not mention that the offender had no reason or excuse for his absence, or that he was within England;

(N) *Relative to Nonconformity to the Worship of the Church.*[1]

II. As to Chapels.[2]

(A) *Relative to Private Chapels.*[3]

(B) „ *Free Chapels.*[4]

but he must show this in his plea. The stat. 3 Jam. 1, c. 4, s. 16, provides, that no proceedings on the above statutes shall be reversed for any defect of form, other than by direct traverse of the party's not having been at church, &c. The offence need not be alleged in the county where the party was at the time, it being a mere nonfeasance, and, properly speaking, not committed anywhere. 1 East, P. C. 18; Hawk. b. 1, c. 10, s. 2; 5 Bac. Abr. Heresy, D. 7. Various pleas and excuses may be successfully offered to prosecutions under these statutes. By sect. 24 of the stat. 1 Eliz. c. 2, punishment by the ordinary is a bar to further proceedings. 1 East, P. C. 19. Stat. 23 Eliz. c. 1, s. 5, only affects persons above sixteen years of age. An indictment for any first offence may be avoided by conformity, and all penalties prevented by showing a sufficient excuse for absence; and Catholic and Protestant Dissenters may plead the Acts of Toleration, and of 31 Geo. 3, to almost all prosecutions under these acts. *Evidence.*—Proof of absence from the party's own parish church is, it is said, sufficient to throw the *onus* upon him of proving where he went to church. 1 East, P. C. 19.

An indictment for stopping *communem viam pedestrem ad ecclesiam de Whitby*, is good. *Rex v. Thrower*, 1 Vent. 208.

[1] The Ecclesiastical Court may punish persons who do not go to church on Sunday, but it seems a parishioner is not bound to go to his own parish church. *Britton v. Standish*, 1 Salk. 166; 3 id. 88; 6 Mod. 188; Holt, 141.

[2] Where the owner of the chapel only allows the preacher to have the key for the purpose of preaching, the latter has not such a possession as to maintain trespass. *Revett v. Brown*, 5 Bing. 7; 2 M. & P. 12.

Where a chapel has been duly consecrated, the incumbent of the parish does not require any license to perform divine service therein. *Moysey v. Hellicat*, 2 Hagg. Rep. 30.

Two chapelwardens are not liable jointly for goods ordered by one. *Shaw v. Hislop*, 4 D. & R. 241.

Where, before the 1 & 2 Wm. 4, a suit was instituted by the incumbent of a parish against the defendant for performing divine service without lawful authority in a chapel newly erected within the parish, and endowed by an individual as a chapel of ease, with the sanction of the bishop:—*Held*, that as by the general law the concurrent consent of patron, incumbent, and ordinary, would have been necessary but for the 7 & 8 Geo. 4, c. 72 (Church Building Act), the provisions of that act must be shown to have been strictly complied with; and where, therefore, the formal proceedings of the Board of Commissioners had been postponed until their powers had been more defined by parliament, and in the mean time the suit was instituted, the defendant could not be deemed to have a legal authority for the performance of ecclesiastical duties in the chapel within the 7 & 8 Geo. 4, c. 72, s. 3. *Bliss v. Woods*, 3 Hagg. (Arches), 486.

If there be a burial-ground attached to the chapel under a local act, by which a minister is to be appointed, and no mention is made as to the burial-fees, the lay-rector of the parish is entitled to them, he having received them before the passing of this statute. *Spry v. Emporor*, 6 Mee. & W. 639.

Where by the local act the vestrymen were authorised to settle and fix the burial-fees of a new burial-ground, but which they had neglected to exercise:—*Held*, that there were no fees legally existing, notwithstanding a proviso that they should not reduce them below the fees then paid for burials in the other existing burial-grounds in the parish, and the libel for subtraction of fees rejected. *Spry v. Marylebone Directors and Guardians*, 2 Curt. (Cons.), 5.

[3] Private chapels are such as noblemen and religious persons have erected at their own individual charge for the accommodation of themselves and their families. These private chapels and their ornaments are to be maintained at the party's expense to whom they belong, and chaplains provided for them, and should be consecrated by the bishop of the diocese. *See* Degge, p. 1, c. 12.

And by the 71st canon, no minister shall preach or administer the holy communion in any private house, unless it be in times of necessity, when any being either so impotent as they cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence, and excommunication for the second: provided, that houses are here reputed for private houses wherein are no chapels dedicated, and allowed by the ecclesiastical laws of this realm; and provided also, under the pain before expressed, that no chaplain do preach or administer the communion in any places but in the chapels of the aforesaid houses; and that also they do the same very seldom upon Sundays and holidays, so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least.

[4] A free chapel is exempt from all ordinary jurisdiction. *See* Gibs. 210. The king may erect a free chapel, and exempt it from the jurisdiction of the ordinary, or may license a subject so to do. *See* Degge, p. 1, c. 12. And in Godb. 145, it is said, the

(C) *Relative to Chapels of Ease.*[1]
(D) „ *the Repairs.*[2]

CHURCHES and CHAPELS, Setting Fire to. *See* Arson, vol. i. p. 539.

24 & 25 Vic. c. 97, s. 1. "Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

CHURCHES and CHAPELS, Injury to by Rioters. *See* 24 and 25 Vic. c. 97, ss. 11, 12; and *post*, Malicious Injuries; Riot.

CHURCH-RATES.

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V. Proceedings before Justices for the Recovery of the Rate, p. 113.

I. Nature of Church-Rates.[3]

Veley v. Burder, 12 Ad. & E. 265–301.

Per Tindal, C. J. "We are all of opinion that the obligation by which the parishioners (that is, the actual residents) within, or the occupiers of lands

The obligation to provide for the repair of

king may license a subject to found a chapel, and by his charter exempt it from the visitation of the ordinary; but in Gibs. 211, it is said, no instance has ever occurred.

[1] A chapel of ease merely, is that which was not allowed a font at its institution, and which is used only for the ease of the parishioners in prayers and preaching (sacraments and burials being received and performed at the mother-church), and commonly where the curate is removable at the pleasure of the parochial minister. A chapel of ease may, however, have the rights of a parochial chapel by custom; but in the present day, when a chapel is instituted, though with the parochial rights of christening and burying, there is usually, if not always, a reservation of repairing to the mother-church on a certain day or days, to preserve the subordination. Gibs. 299.

By the 6 & 7 Vic. c. 37, 7 & 8 Vic. c. 94, and 19 & 20 Vic. c. 104, provision is made for empowering the Ecclesiastical Commissioners for England, in the case of parishes, chapelries, and districts of great extent, and containing a large population, to constitute any part or parts thereof a separate district for spiritual purposes. As to dissenters' meetings, *see* 52 Geo. 3, c. 55; 2 Atk. 498; and the meeting of more than twenty persons (id.); and exemptions in 18 & 19 Vic. c. 86, s. 1.

[2] The repairs of a chapel are to be made by rates on the landholders within the chapelry, in the same manner as the repairs of a church; and such rates are to be enforced by ecclesiastical authority. *See* Gibs. 209; 58 Geo. 3, c. 45, s. 18; 59 id. c. 134, s. 12.

[3] In *Burder v. Veley*, 7 Q. B. 233, the churchwardens duly convened a parish vestry, and proposed a rate for the necessary repairs and expenses of the parish church, which a majority of the assembled parishioners then refused to make. And it was held that a rate made by the churchwardens alone, at a subsequent day and meeting, not being a parish meeting, was illegal and void. The churchwardens had libelled a parishioner in the spiritual court for non-payment of the rate, and the above facts appeared on the face of the rate; and in the proceedings in that court the judge admitted the libel to proof. The Court of Queen's Bench held that a prohibition ought to be awarded.

the church is a duty imposed on the occupiers of land within the parish by the common law.

and tenements in every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to divine service therein, is an obligation imposed on them by the common law of the land. . . . . Such, then, being the law of the land, it follows, as a necessary consequence, that the repair of the fabric of the church is a duty which the parishioners are compellable to perform—not a mere voluntary act, which they may perform or decline at their own discretion; that the law is imperative upon them absolutely that they do repair the church, not binding on them in a limited or qualified manner only, that they may repair or not, as they think fit; and that, where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law deliberate and determine, is not whether they will repair the church or not (for upon that point they are concluded by the law), but how, and in what manner, the common-law obligation so binding them may be best and most effectually, and, at the same time, most conveniently and fairly, between themselves performed and carried into effect. The parishioners have no more power to throw off the burthen of the repair of the church than that of the repair of bridges and highways, the compelling of the performance of the latter obligation belonging exclusively to the temporal courts, though that of the former has been exercised usually, although perhaps not necessarily or exclusively, by the spiritual courts from time immemorial."

II. Of the Making of the Rate.[1]

[1] The church-rate is generally made according to the poor-rate, although, in strictness, a distinct valuation ought to be made; and where made on this basis, the presumption is strongly in favour of the assessment (*Lambert & Simpson v. Weall*, 4 Hagg. C. R. 91. See *Thompson v. Cooper*, 3 Phil. 640, r.); but if it can be clearly and affirmatively proved by the party objecting to the rate that the assessment is, in fact, unequal, it will furnish no answer to the objection to show that the rate has been made according to the poor-rate. See *Medland v. Paine*, 4 Jur. N. S. 1283; 7 W. R. 357. And it must be assessed on the occupier and not the landlord, notwithstanding a local act makes the poor-rates payable by the latter. *Chesterton v. Farlar*, 1 Curt. 345. *White v. Beard*, 2 id. 480. See *Hanes v. Pellatt*, 2 id. 473.

The rate must, by its heading or otherwise, show upon its face for what purpose and by what authority it was made, or it will be void. *Re the Eastern Counties Railway Co.* 25 L. J. M. C. 49. And the purpose so indicated must be conformable with law. *R. v. Byrom*, 12 Q. B. 321.

The churchwardens are bound to furnish an estimate of the probable sum required for the rate. If they neglect to do so the vestry may refuse to enter upon the question of church-rates. *R. v. St. Margaret's, Leicester*, 10 Ad. & E. 730; 2 Per. & D. 510. See *Medland v. Paine*, 4 Jur. N. S. 1283. *Smith v. Dixon*, 2 Curt. 264. But the parishioners are not bound by the estimate, and may support any amendment varying the amount, provided they act *bonâ fide*, and do not refuse to make a rate, or grant one manifestly collusive or inadequate. *Greenwood v. Greaves*, 4 Hagg. 83. The vestry may delegate the power of making a rate to a committee nominated for that purpose. *Hill v. Palfrey*, 2 Curt. 902. *Reg. v. St. Stephen's, Coleman Street*, 14 L. J. Q. B. 34.

If the church be out of repair, and a rate be necessary, the vestry are bound to make one. *Gosling v. Veley*, 19 Q. B. 111; 4 H. of L. C. 679.

The churchwardens, if empowered by a resolution of the vestry, may of their own authority assess the rate, provided they do not exceed the authority imposed upon them by the resolution. *White v. Beard*, 2 Curt. 480. *R. v. Byrom*, 12 Q. B. 321. And where the parishioners in vestry refuse to make a rate for necessary repairs the churchwardens may make it of their own authority. *Veley v. Burder*, 1 Curt. 372. *Gandern v. Selby*, id. 394.

The Church Building Acts empower the churchwardens, with the consent of the bishop and incumbent, as well as the vestry, to raise money on the security of the church-rates for the enlarging or otherwise extending accommodation in the churches or chapels of the parish, and also for the purpose of repairs (*see* 58 Geo. 3, c. 45, s. 59); and for the building of new churches (58 Geo. 3, c. 45, s. 59. *See* 3 Geo. 4, c. 72; 5 Geo. 4, c. 103). In order to render a rate made under any of these acts valid, the requirements of the statute must have been strictly complied with. *R. v. Willim & another, Chapelwardens of Bilston*, 16 Q. B. 1. *R. v. Churchwardens of Dursley*, 5 Ad. & E. 10. *Blunt v. Harwood*, 1 Curt. 648. *Williams v. George*, 3 id. 343.

The inhabitants of a district parish, under stat. 58 Geo. 3, c. 45, s. 71, are liable to con-

Gosling v. Veley, 12 Ad. & E. 406.

A monition founded on an allegation that a parish church was out of repair issued from an ecclesiastical court, requiring the churchwardens to call a vestry for the purpose of making a rate, and the parishioners to meet in such vestry, and then and there make a rate for repair of the church and decent celebration of divine service, &c. therein. The churchwardens gave notice of a vestry meeting, and the vestry met in obedience to the monition, where the monition and notice were read, and the churchwardens produced a survey and estimate; to which no objection was made, nor was the necessity for the repairs, &c. disputed. A rate of two shillings in the pound was then proposed and seconded, upon which an amendment stating an objection to church-rates in general, and refusing to make any rate, was proposed and seconded, put to the meeting, and carried by a majority. The chairman then asked whether any proposition as to amount of rate was made, to which no affirmative answer was returned. Thereupon the churchwardens and other members of the meeting, being a minority of those present, made a rate. A protest was then delivered on behalf of the majority of those present. The churchwardens proceeded against one of the persons so rated in the Ecclesiastical Court in a cause of subtraction of church-rate, setting forth the above facts in the libel and in the proofs propounded. The libel, &c. having been admitted to proof, the party proceeded against declared in prohibition. On general demurrer to the declaration, by which all the facts appeared,—

A resolution by the majority present at the vestry-meeting, that no church-rate should be made, is inoperative, and if the minority agree on a rate after such resolution, the rate so made will be valid.

The court held, first, that the parties voting for the amendment must be considered as having declined to join in the proceedings of the meeting, the amendment having no reference to the object for which the vestry was summoned under monition; that the persons so voting, therefore, left the question in the hands of the remainder; and that the rate was legally made. Secondly, that it was unnecessary again to put the rate formally to the vote, inasmuch as it had, in fact, been taken into consideration and negatived by the amendment; though it would have been more regular not to put the amendment.

(A) *A* Mandamus *does not lie to Compel the Making of.*[1]

(B) *Mode of Objecting against Validity of.*[2]

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tribute to the incidental expenses of the mother-church. *Chesterton v. Farlar*, 1 Curt. 347.

As no particular form of notice of meeting is given by the Vestry Act (58 & 59 Geo. 3), a notice that a report will be carried into effect is sufficient. *Blunt v. Harwood*, 3 W. & P. 577; 8 Ad. & E. 610; questioning *Gare v. Gapper*, 3 East, Rep. 472.

If the parishioners consent to the churchwardens borrowing money under 58 & 59 Geo. 3, it amounts to a consent to make a rate. *Rex v. St. Mary's, Lambeth*, 3 B. & Adol. 651.

[1] The Court of Queen's Bench will not grant a *mandamus* to compel the making of a church-rate at common law, such rate being purely and exclusively of ecclesiastical cognisance; but if the rate is created by act of parliament, and differs in any respect from a common-law rate, either as to the purposes for which it is directed to be made, or the parties by whom it is to be made, or the manner in which it is to be made, disputed, or enforced, there the temporal courts have jurisdiction, and *mandamus* lies. *R. v. St. Saviour's, Southwark*, 7 Ad. & E. 925. *R. v. Churchwardens of St. Mary, Lambeth*, 3 B. & Adol. 651. *R. v. St. Margaret's, Leicester*, 8 Ad. & E. 889. *Hopkinson v. Puncher*, 3 Ex. 95. So a *mandamus* will lie to compel the making of a rate for the repayment of money borrowed under the Church Building Acts. *R. v. Churchwardens of St. Mary, Lambeth*, 3 B. & Adol. 651.

[2] There is no appeal against a church-rate, and the parties assessed have no means of contesting its validity till the churchwardens think fit to sue them for non-payment of it. When so sued in the Ecclesiastical Courts, the parties rated are permitted, by way of defence, that, although the rate was made in all due formality, and although it professes to be made only for necessary and lawful purposes, it was, in truth, made for some unlawful purpose, and that it is excessive. The misapplication of the fund might be objected to when the churchwardens are called upon to render their accounts, but the course of Ecclesiastical Courts is to relieve the parishioners from the payment of such a rate, and to pronounce it to be illegal. *Per Lord Campbell, C. J.: Tozer v. Child*, 25 L. J. Q. B. 337. See *Ramsbottom v. Duck-*

III. What Property is Assessable.[1]

IV. Enforcing Payment of the Rate in the Ecclesiastical Court.[2]

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worth, 1 Ex. 506; *R. v. Collins*, 21 L. J. M. C. 73.

The only method of quashing a rate is of entering a *caveat* against its confirmation. *Watney v. Lambert*, 4 Hagg. 84.

[1] When lands are in a farm, the tenant and not the lessor is rated. Gibs. 221. And even where, as in the Small Tenements Act, 13 & 14 Vic. c. 99, the landlord is by statute rateable to and liable to pay the poor-rate, the occupier is, nevertheless, the proper party to be assessed to the church-rate. *Richardson v. Gladwin*, 1 E. B. & E. 138. See *Chesterton v. Farlar*, 1 Curt. 347. *Farlar v. Chesterton*, 2 Moore, P. C. 330. Stock-in-trade may be liable by custom to be rated. *Miller v. Bloomfield*, 1 Add. 499. See *Medland v. Paine*, 4 Jur. N. S. 1283. If a parish consist of several vills, there may be a custom that the rate shall be imposed in certain proportions. *Burton v. Wiledey*, Andrews, 32. *R. v. Chapelwardens of Haworth*, 12 East, 556. *Stead v. Heaton*, 4 T. R. 669. See *R. v. Marsh*, 5 Ad. & E. 468; 6 N. P. 668. But there cannot be a custom for a particular township or vill to contribute to the rate without its inhabitants being summoned to the vestry. *R. v. Dalby*, 3 Q. B. 602.

Where a local act for taking down and rebuilding a parish church directed the rates to be made on the full annual rent or value of the houses, warehouses, shops, buildings, lands, tenements, and hereditaments, rated or rateable to the relief of the poor of the said parish, on all and every the tenants and occupiers of the said parish, the court held that the tithes of the parish were rateable, being included in the express words of the statute. *R. v. Barker*, 6 Ad. & E. 388.

The hall of a company is liable to be rated to the repairs of the church. *Thursfield v. Jones*, 1 Burn. Ecc. L. 384; 7 Jones, 187. A pew-owner cannot be rated in respect of a pew. *Hawkins v. Compeigne*, 3 Phill. 11. Churches, district churches, chapels, meeting-houses or premises, or such part thereof as are exclusively appropriated to public religious worship, duly certified for such worship, and exclusively appropriated thereto, are exempt. 3 & 4 Wm. 4, c. 30.

As to the exemption of literary institutions, *see* Literary Institution and Poor's-rate.

A person cannot be assessed in respect of a mere incorporeal hereditament, as a right of common or a right of way; but if his right to turn out cattle is connected with the possession of the land, or if he has the exclusive occupation of the way, as of a towing-path, he will be liable to the church-rate. *Medland v. Paine*, 4 Jur. N. S. 1283; 7 W. R. 357.

The lessee of tithes must contribute to a church-rate. *Rex v. Barker*, 6 Ad. & E. 388. *Rex v. Buckingham, Justices of*, 1 W. & P. 503. But a township which supports its own chapel is exempt from a rate for supporting the parish church. *Craven v. Saunderson*, 8 Ad. & E. 880; 2 W. & P. 641.

With respect to public institutions of a charitable character, the principle of rating seems to be that the objects of the charity, or the mere servants of the institution, cannot be rated; but where there is a beneficial occupation by officers of the establishment of separate and distinct apartments, for the use of themselves and their families, such officers are rateable as the inhabitants and occupiers of such separate and distinct apartments, which are considered as their dwelling-house. Prid. Churches, 160. See *R. v. Ponsonby*, 3 Q. B. 14. *R. v. Sir M. A. Shee*, 4 id. 2. *Lord Bute v. Grindall*, 1 T. R. 338; 2 H. Bl. 265. *Smith v. Keats*, 4 Hagg. C.R. 275. *R. v. Occupiers of St. Luke's*, 2 Burr. 1053. *R. v. Saint Bartholomew the Less*, 4 id. 2435. *Holford v. Copeland*, 3 B. & P. 139. *Tracey v. Taylor*, 3 Q. B. 966. *Neave v Weather*, id. 984.

A church-rate may be retrospective, but if questioned in the Ecclesiastical Court, though held to be valid, it cannot be enforced by justices under the 53 Geo. 3. *Rex v. Sillifant*, 5 Nev. & M. 640; 4 Ad. & E. 354. But money cannot be borrowed for repairs already done, nor is a rate to pay such money legal. *Rex v. Dursley*, 6 Nev. & M. 333; 5 Ad. & E. 10.

[2] The cognisance of church-rates belongs peculiarly to the ecclesiastical courts (13 Edw. 1, *circumspecte agatis*), and, generally speaking, parishioners who refuse to pay them ought to be sued there. Degge, pt. 1, c. 12. *Paget v. Crumpton*, Cro. Eliz. 659. The mode of proceeding is by a suit for the subtraction of church-rate (*i.e.* a refusal to pay the sum at which the party has been assessed), in which objections to the legality of the rate may be raised. *Lambert v. Simpson*, 4 Hagg. Ecc. R. 91. The Ecclesiastical Court will not in this suit issue a monition on the application of the defendant for the production of the parish books, which are not shown to apply immediately to the question at issue, and if on the merits the rate be pronounced for, the court will condemn the defendant in costs. *Goodall v. Whitmore*, 2 Hagg. Ecc. R. 369. If a corporation is rated, the spiritual court may proceed against the officers for non-payment, as the citation cannot be executed upon the corporation aggregate. *Thursfield v. Jones*, 7 Jon. 187. By 3 & 4 Vic. c. 93, s. 1, in cases of subtraction of church-rates for an amount not exceeding 5*l.*, the ecclesiastical judge may discharge a party in contempt if he has suffered imprisonment for six months, on payment of the costs in the Ecclesiastical Court of the sum for which he was cited. See *Baker v. Thorogood*, 2 Curt. 632; Steer's Parish Law, 450, 3rd ed.

V. Proceedings before Justices for Recovery of the Rate.

By 53 Geo. 3, c. 127, s. 7, "when any person rated to church or chapel-rate (the validity of which has not been questioned in any ecclesiastical court), shall refuse to pay the same, any justice of the county, city, or town, where the church is situate, on complaint of any churchwarden or churchwardens,[1] who ought to receive the same, may convene, by warrant, such person before two or more justices, and examine, on oath administered to by them, into the merits of the complaint, and, by order under their hands and seals, may order payment of any sum so due, not exceeding 10*l.*, besides costs, ascertained by the justices;[2] and on refusal or neglect to pay according to such order, any one of such justices, by warrant under hand and seal, may levy the money thereby ordered to be paid, with the above costs, as well as those of distress being first allowed as above, by distress and sale of the goods of the offender, his executors or administrators, rendering him the overplus.[3] Any person grieved by the judgment of two or more such justices may appeal[4] to the next quarter sessions for the county, &c. wherein the church, &c. for which the rate was made is situate; and if the justices present, or a majority, find cause to affirm the judgment, it shall be decreed by order of sessions, with costs, to be levied by distress and sale of appellant's goods: Provided that when such appeal is made as above, no

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A citation stating only as the matter of charge that the party cited (a parishioner) wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making, of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church, does not show an offence cognisable by the Ecclesiastical Court. *Francis v. Steward*, 5 Q. B. 984.

[1] The justices may act on the complaint of one churchwarden. *R. v. Fenton*, 1 Q. B. 480. *R. v. Inhabitants of St. Clements*, 12 Ad. & E. 177. *R. v. Justices of Ipswich*, 3 Per. & D. 481. *See* 1 L. T. (N. S.) 32.

An order of justices, founded upon a complaint made by churchwardens *de facto*, though not *de jure*, is good. *Reg. v. St. Clements, Ipswich*, 3 Per. & D. 481.

[2] Notwithstanding this statute, the ecclesiastical courts have jurisdiction over church-rates not exceeding 10*l.* in all cases where the validity of the rate or the liability of the party charged is disputed. *Ricketts v. Bodenham*, 4 Ad. & E. 433. *R. v. Thorogood*, 12 id. 183; 3 Per. & D. 629. But where the rate or liability of the party is not disputed, the jurisdiction of the court Christian is taken away. *Richards v. Dyke*, 3 Q. B. 256; 2 Gale & D. 493. *White v. Beard*, 2 Curt. 488. See *R. v. Barnes*, 1 Craig & Phil. 42. As to the recovery of rates from Quakers, *see* 7 & 8 Wm. 3, c. 34, s. 4.

The provisions for the recovery of church-rates before justices apply to rates under the Church Building Acts, and the 5 Geo. 4, c. 36, as well as to ordinary common-law rates. *R. v. Justices of Staffordshire, Ex parte Churchwardens of Abbott's Bromley*, 27 L. T. 284. *See* 27 L. J. M. C. 192.

Refusal to obey the order of justices for payment of church-rates after due service and demand of payment, exposes the party to an indictment for disobeying an order of justices. *R. v. Bidwell*, 17 L. J. M. C. 99; 1 Deac. C. C. 223.

[3] The complaint must be made within six calendar months from the refusal or neglect to pay, *i. e.* from the demand. 11 & 12 Vic. c. 43, s. 11 (*R. v. Justices of Shrewsbury*, 31 L. T. 114); or from his giving a voluntary notice that he will not pay, or other circumstances warranting the inference of his having neglected or refused to pay. *R. v. Mirehouse*, 1 L. T. (N. S.) 32. Before issuing his warrant, the justice has a right to call for the production of the rate, in order to satisfy himself that it is good on the face of it, and that it is a church-rate only; and if it appear to be illegal, he will be justified in refusing his warrant. *R. v. Byrom*, 12 Q. B. 321. *R. v. Eastern Counties Railway Co.* 25 L. J. M. C. 49. See *R. v. Sillifant*, 4 Ad. & E. 354; 5 Nev. & M. 640. *Reg. v. Justices of Salop*, 29 L. J. M. C. 39. If the party gives notice that he intends to dispute the validity of the rate or his liability to pay it, the jurisdiction of the justices is ousted (*R. v. Chapelwardens of Milnrow*, 5 M. & S. 248. *Dale v. Pollard*, 10 Q. B. 504), provided they have reason to be satisfied that such professed intention is *bonâ fide*. *R. v. Wrottesley*, 1 B. & Ad. 648. *R. v. Collins*, 17 Q. B. 816; 21 L. J. M. C. 73. *Robinson v. Purdy*, 16 Mee. & W. 11; 29 L. J. M. C. 203; 30 id. 118. The justices cannot inquire into the validity of the rate; they must make the order if it has been made by a vestry duly convened, and is good on the face of it, and has not been questioned in any ecclesiastical court. In order to invalidate the rate by extraneous circumstances, the party must go to the Ecclesiastical Court. *Ramsbottom v. Duckworth*, 1 Ex. 506.

[4] The notice of appeal may be given to the churchwardens, and not to the justices making the order. *Rex v. Justices of Staffordshire*, 6 Nev. & M. 477; 4 Ad. & E. 842.

distress-warrant shall be granted till after its determination; and that nothing herein shall alter the jurisdiction of ecclesiastical courts to hear and determine causes touching the validity of any church or chapel-rate; or from enforcing payment thereof, if exceeding 10*l.*, from the party proceeded against: if the validity of such rate or liability of the person from whom it is demanded be disputed, and the party give notice thereof to the justices, they shall forbear giving judgment thereon, and the persons demanding the same may proceed to recovery of their demand by due course of law, as before accustomed; but nothing herein shall affect parliamentary regulations respecting church or chapel-rates of any particular parishes or districts." And by 54 Geo. 3, c. 170, s. 12, "the goods and chattels of any person neglecting to pay any sum legally assessed on him for any church-cess, for seven days after demand made, may be distrained, not only within the district, parish, township, or hamlet, in which it is made, but also within any other district, parish, &c. within the same county, riding, division, or jurisdiction; and if sufficient distress cannot be found within such county, &c., then, on oath thereof made before any one or more justice or justices of the peace of any county, &c. in which any of the goods or chattels of such person shall be found, which oath such justice or justices shall administer and certify, by indorsing his or their name or names on the warrant granted to make such distress, and such goods, &c. shall be liable to such distress and sale in such other county, &c., and may, under such warrant and certificate, be distrained and sold, as if found within the district, parish, &c. in or for which the rate was due."

CHURCHWARDENS.

See Apprentice, vol. i. p. 394; Churches and Chapels, *ante*, p. 100; *Mandamus;* Overseers; Poor; *Quo Warranto.*

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(A) *Production and Inspection of Accounts*, p. 117.

I. Nature of the Office.[1]

[1] Churchwardens are officers of the parish in ecclesiastical affairs. They are the guardians and keepers of the church, and the legal representatives of the parish body; and are also, to a certain degree at least, guardians of the moral character and public decency of the parish. *Griffiths v. Reed*, 1 Hagg. Ec. 208. *Governors of St. Thomas's Hospital v. Treherne and Co.* 1 Lee, 129. Their principal duties are these: first, to present all matters happening in the parish contrary to the ecclesiastical laws; secondly, to keep the church in repair, to guard the various things belonging to it, and to provide such things as may be necessary for the decent service of it. Prideaux, *Churchwarden's Guide*, 9th ed. 1. They are also *ex-officio* overseers of the poor (43 Eliz. c. 2); but this office of overseer of the poor is confined to the churchwardens of a parish, or reputed parish, and does not extend to the churchwardens of a township or chapelry maintaining its own poor, although such township or chapelry be a perpetual curacy supporting its own church, and independent of the parish, except by the payment of a small annual sum towards the repairs of the parish church. *Rex v. Justices of North-Riding of Yorkshire*, 6 Ad. & E. 863: but see *Walsh v. Southwell*, 20 L. J. M. C. 165; and *see* also *Rex v. Marsh*, 5 Ad. & E. 468; 5 Nev. & P. 668. *Astle v. Thomas*, 2 B. & C. 271. And by various acts a number of additional temporal duties have devolved on churchwardens. *See* Prideaux, *Churchwarden's Guide*, 3.

Besides the common-law office of churchwarden, which is a parochial office, the Church Building Acts provide for the appointment of churchwardens and chapelwardens for the respective churches and chapels built or appropriated under those acts, who are not parochial officers, and whose duties are regulated by the respective acts of parliament, and confined to the care and management of the affairs of the church or chapel to which they are appointed. *See* 58 Geo. 3, c. 45, ss. 73, 74; 59 id. c. 194, s. 30; 1 & 2 Wm. 4, c. 38, ss. 16, 23; 6 & 7 Vic. c. 37, s. 17, and 8 & 9 id. c. 70.

When, however, a chapel of ease, with a district attached, is, for ecclesiastical pur-

II. Of the Persons Eligible as.[1]

Rex v. Wix, 2 B. & Adol. 197.

A custom not immemorial, that churchwardens shall act as overseers, is bad.

A custom, set out in the return to a *mandamus* to the inhabitants of a parish to elect churchwardens, that the overseers, time out of mind, had been used to perform the duties,—

The court held the custom bad: the appointment of overseer not having immemorially existed, and there having been antecedently persons discharging those duties. And in case of disobedience, the court would grant a criminal information against the inhabitants on whom the writ had been served.

III. Election[2] and Swearing in.[3]

Campbell v. Maund, 1 Nev. & P. 558; 5 Ad. & E. 865.

Under the 5 Geo. 4, the

Sturges Bourne's Act (58 Geo. 3, c. 69), giving a plurality of votes to rate-

poses, constituted into a separate and independent parish church under 1 & 2 Wm. 4, c. 38, s. 23, it is enacted, that the churchwardens appointed under the act shall "do all things pertaining to the office of churchwardens, as to ecclesiastical matters, in like manner as though the same had been of old time a separate and distinct parish." And it is by the 6 & 7 Vic. c. 37, s. 17, enacted, "that every person chosen churchwarden of a new parish under that act shall do all things pertaining to the office of churchwarden, as to ecclesiastical matters, in the said new parish."

[1] Generally speaking all persons inhabitants of the parish are liable to serve the office of churchwarden. Prideaux, 5. He must reside within the parish, or at least be a householder personally occupying a house in the parish, if not necessarily resident therein. 1 Hagg. Com. Rep. 379. *Stephenson v. Langston*, id. *Brook v. Owen*, 3 Phil. 517, n.; 1 Hagg. Com. R. 380. *Ford v. Chancey*, id. 382, n. *See* also *R. v. Hall*, 1 B. & C. 123. *R. v. Poynder*, id. 178. A mere lodger or inmate is not qualified to the office of churchwarden. See *Ford v. Chancey, supra.* Aliens, denizens, naturalised subjects, children, persons convicted of felony (*Anthony v. Seyer*, 1 Hagg. 9), fraud or perjury (4 & 5 Wm. 4, c. 76, s. 48), and Jews (*Anthony v. Seyer, supra*), are disqualified. It has been said also that Roman Catholics are disqualified (id.), but this is questioned by Mr. Prideaux, p. 9, 9th ed.

Peers (Gibs. 215), members of parliament (*Stephenson v. Langston*, 1 Hagg. Com. 380), sheriffs (*R. v. Gayer*, 1 Burr. 245), acting justices of the peace (*Abdy's case*, Cro. Car. 585; 6 Mod. 140), clergymen (1 Vent. 105; 2 Stra. 1007), Roman Catholic clergymen (31 Geo. 3, c. 32, s. 8; 52 Geo. 3, c. 155, s. 9), attornies (Mod. 22; 2 Keb. 447; 1 Roll. R. 368. *Prouse's case*, Cro. Car. 389. *Ex-parte Jeffries*, 6 Bing. 195), practising physicians in the city of London and its suburbs (5 Hen. 8, c. 6; 32 Hen. 8, c. 40), members of the College of Surgeons in London (18 Geo. 2, c. 15), practising apothecaries (6 Wm. 3, c. 4; 1 Anne, c. 11; 10 Anne, c. 14), officers in the army, navy, and marines, though upon half pay (*R. v. Gayer*, 1 Burr. 245; 1 Ld. Ken. 492), serjeants, corporals, drummers, and privates serving in the militia (42 Geo. 3, c. 90, s. 174), registrars of births, deaths, and marriages (1 Vic. c. 22, s. 18), officers of excise (7 & 8 Geo. 4, c. 53, s. 11) or customs (8 & 9 Vic. c. 85, s. 12), or employed in the Post-office (*Ex-parte Atkinson*, 10 Bing. 399; 2 Dowl. 773), persons serving the office of churchwarden or other parochial office in another parish (*Stephenson v. Langston*, 1 Hagg. Com. 380, n.), preachers of dissenting congregations, duly qualified (1 Wm. 3, s. 1, c. 18; 52 Geo. 3, c. 155, s. 90). And generally all persons holding any public office which requires a constant and personal attendance, are exempt from serving all parish offices where the duties require personal attendance, and are not of a purely ministerial kind, and such as can be performed by deputy. Esp. N. P. 359; Prideaux, 13.

Neither poverty (*R. v. Martin Rice*, Ld. Raym. 138; 1 Salk. 166), nor bodily infirmity (*Cooper v. Ansell*, 3 Phil. 165), exempts from serving.

[2] In general, the minister and parishioners are to choose two churchwardens, and if they do not concur, then the minister to choose one and the parishioners the other. *Slocombe v. St. John's*, 1 Burn. Ecc. L. 401. *See* Carth. 118; Hard. 378. By custom, both may be chosen by parishioners without the parson (2 Roll. Abr. 234; Cro. Jac. 532), or by a select vestry or limited number of parishioners. Hard. 379; 1 Mod. 181. *See* 1 Stra. 145; Peake, N. P. 1156.

[3] The chairman has not the right to adjourn where a poll is demanded; the right is in the parish at large, unless he has given previous notice. *Rex v. Archdeacon of Chester*, 1 Ad. & E. 342; 3 Nev. & M. 413. If vestry doors be closed at the election of churchwardens it is not illegal, unless any voter be excluded. *Reg. v. St. Mary, Lambeth*, 3 Nev. & P. 416. The archdeacon is bound to swear in the churchwardens, though two sets claim colourable titles. *Rex v. Archdeacon of Middlesex*, 3 Ad. & E. 615; 5 Nev. & M. 494.

electors vote according to their rating.

payers according to their rating, exempts (sect. 8) from its provisions any vestry holden by virtue of any special act, or of any usage or custom. The local parochial act for Paddington (5 Geo. 4, c. 126), enacts, "that the election of churchwardens shall be conducted from year to year in such manner as hath been usual in the same parish." It was proved in evidence that the mode of electing churchwardens had been by show of hands, no poll ever having been demanded.

The court held that this was no evidence of a custom to exclude the granting of a poll when properly demanded; and, therefore, that the mode of electing churchwardens in Paddington before the 58 Geo. 3 was by show of hands, with a power of going to a poll, in which case single votes carried the election; and that Sturges Bourne's Act having given such voter a plurality of votes according to his estate, a show of hands, with a power of demanding a poll, and plurality of voting, was the mode of election at the time of passing the local act (5 Geo. 4), and continued by it. Sect. 10.

(A) Mandamus *lies to Elect.*[1]

(B) „ „ *Swear in.*[2]

IV. Of their Rights, Duties, and Obligations.

Doe d. Higgs v. Cockell, 6 Nev. & M. 179; S. C. 4 Ad. & E. 478.

Lands had been leased by churchwardens prior to the 59 Geo. 3: —*Held* to be evidence of it being parish land, which passed to the succeeding churchwardens.[3]

In ejectment, it was proved that the lessors of the plaintiff were the churchwardens and overseers of the poor of the said parish of St. Mary, Reading, at the time of the action being commenced, and of the demise in the declaration. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors of the defendants in the tenancy to the different successive churchwardens of the said parish for many years prior to the passing of the stat. 59 Geo. 3, c. 12; and since that act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants down to the time of the expiration of the following notice to quit.

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[1] The court granted a *mandamus* to the inhabitants of a parish liable to contribute to the church-rate to meet and assemble, together with the minister, to elect churchwardens. *Rex v. Wix*, 2 B. & Adol. 197; but see *contra*, *Anon.* 1 Stra. 686; Tapping, 69.

[2] A writ of *mandamus* lies to swear in (*Rex v. Archdeacon of Middlesex*, 5 Nev. & M. 494), or admit a churchwarden, and this although the ministerial office has been inhibited by the bishop. *Rex v. Simpson*, Selw. N. P. *Mandamus*, 1062, n. 1. *Anon.* 1 Vent. 115. And the court will grant a rule absolute, *in the first instance*, for a *mandamus* to the archdeacon to swear in a party as churchwarden on an affidavit of due election, demand, and refusal, and of notice to the archdeacon of the application to the court, the grounds of refusal not appearing by the affidavits in support of the rule. *Ex-parte Wingfield*, 1 Har. & W. 614; and see *Rex v. Middlesex*, id. 615. *Ex-parte Duffield & another*, id. 617; Tapping, 68.

[3] Payment of rent to churchwardens, and proof their having granted previous leases, is evidence of the land being parish land. *Doe d. Higgs v. Terry*, 5 Nev. & M. 556. See *Phillips v. Pearce*, 5 B. & C. 433; 8 D. & R. 43. The 59 Geo. 3, c. 12, constitutes churchwardens and overseers a body corporate, and to take and hold parish lands. See *Allason v. Stark*, 9 Ad. & E. 255. *Doe d. Norton v. Webster*, 4 Per. & D. 270.

Churchwardens must act jointly and together, for what one does without the other has no legal operation; therefore a release by one is no bar to an action by the other. *See* Cro. Jac. 234; Yelv. 173. So one churchwarden cannot dispose of the goods of the parish (*see* Cro. Jac. 234); nor can both (*see* Yelv. 173; 1 Roll. 393), unless the parish consents (1 Roll. 393); but one may present without doing it in conjunction with the other.

In a parish there were four tithings, and a churchwarden for each; but all were sworn to execute the office generally: it was holden that notice to one was sufficient. *Rex v. Marsh*, 6 Nev. & M. 668.

It seems that the churchwardens have a right of refusing to suffer a wardmote to be holden in the church (*see* 2 Ld. Raym. 777; 7 Mod. 29; Holt, 331; 2 Salk. 425); and they are entitled to lay out the parish money as they please, provided they do not do it imprudently and improvidently: hence, if it be laid out truly and honestly, they have a right to be reimbursed; and the parishioners have no remedy in the absence of fraud or deceit, because the parish have made them

The court held, that evidence of payment of rent to churchwardens in their character of churchwardens is sufficient evidence of the buildings, &c., for which that rent was paid, being parish property, so as to vest in the churchwardens for the time being the property in the buildings, by the operation of the stat. 59 Geo. 3, c. 12, s. 17.

(A) *Production and Inspection of Accounts.*[1]

CHURCH Discipline Act.

The 3 & 4 Vic. c. 86, "for better enforcing Church Discipline," recites that the manner of proceeding in causes for the correction of clerks requiring amendment, repeals the act 1 Hen. 7, c. 4; prescribes the course of proceeding which shall hereafter be observed, "in every case of any clerk in holy orders, who may be charged with any offence against the laws ecclesiastical,[2] by empowering[3] the bishop[4] of the diocese in which the offence is alleged to have

their trustees; but if they act imprudently, complaint must be made to the ordinary, who will interpose. *See* Gibs. 196. Churchwardens have no power to interfere in the administration of divine service, for this is the immediate province of the rector or vicar, subject to the cognisance of the ordinary. *See* And. on Churchwardens, 199.

Churchwardens can bring no action after their year of office; but if it be commenced before its expiration, they may proceed after the year has expired. *Dent v. Prudence*, 2 Stra. 832. One churchwarden cannot sue in his own name without joining the other. *Ward v. Brumpton*, 3 Lev. 362; S. P. *Green v. Pope*, 1 Ld. Raym. 127; 28 L. J. C. P. 282.

By 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, and 12 Wm. 3, c. 11, in actions against churchwardens, they may plead the general issue, and the parishioners may give evidence against them. *See* Broom's Parties to Actions, 161–172, n.

A suit in the Ecclesiastical Court lying for a nuisance and injury to a churchyard wall, under a claim of right of way, the court of equity has jurisdiction to restrain the act by injunction; and where the churchwardens instituting the suit have since gone out of office:—*Held*, that they might continue it, and, by a supplemental bill, join their successors as co-plaintiffs. *Marriott v. Tarpley*, 9 Sim. Ch. 279.

Where the defendants, as churchwardens and overseers, in 1813, signed notes for monies borrowed by the parish under order of vestry, and payment of interest had been made within six years by orders of vestry, and entered in the overseers' book of disbursements, and allowed and signed, amongst other parishioners, by one of the defendants:—*Held*, that such payments took the case out of the statute. *Crew v. Petit*, 3 Nev. & M. 456; 1 Ad. & E. 196.

A churchwarden cannot maintain trover against a surveyor of highways for not delivering up his books. *Addison v. Round*, 4 Ad. & E. 799; 6 Nev. & M. 422. In a proceeding by the rector against the churchwardens for altering paths through the churchyard, and erecting gates, without the consent of the rector, a defensive allegation that it was *bonâ fide* done for the convenience of the parishioners, and with their consent in vestry, and with the approval of the rural dean, was rejected, as forming no legal justification. *Walter v. Montague*, 1 Curt. Con. 253.

An action will not lie against a churchwarden for erroneously rejecting a vote at an election of vestrymen and auditors, unless malice be alleged and proved. *Tozer v. Child*, 7 E. & B. 377.

[1] A churchwarden may, by *mandamus*, be compelled, upon showing special reasons, to produce his accounts to a party in pursuance of 17 Geo. 2, c. 38. *Rex v. Clear*, 4 B. & C. 899; 7 D. & R. 393. See *Rex v. Smallpiece*, 2 Chit. R. 288.

The spiritual court may compel churchwardens to deliver their account, though they cannot decide on the propriety of the charges therein, and, therefore, if that court should take any step against a churchwarden after he has delivered in his account it would be an excess of jurisdiction, for which a prohibition would be granted even after sentence. *Leman v. Goulty*, 3 T. R. 3. *Catchside v. Ovington*, 3 Burr. 1922. *Nutkins v. Robinson*, Bunb. 247. *Snowden v. Herring*, id. 389.

There is no general unqualified right on the part of the ratepayers to inspect and take extracts from the churchwardens' books of accounts. To entitle a ratepayer to a *mandamus* to compel such an inspection, some special and tenable ground must be shown. *Ex-parte Briggs*, 28 L. J. Q. B. 272.

[2] By sect. 23, no criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than according to the provisions of this act. *In re the Dean of York*, 2 Q. B. 1. *Ex-parte Denison*, 4 E. & B. 292. *Rackham v. Black*, 9 Q. B. 1. Suits, though in form criminal, if brought to assert civil rights, may be prosecuted as before. Sect. 19.

[3] It is in the discretion of the bishop, whether he will or will not issue a commission. A *mandamus*, therefore, will not lie to compel him to do so, where he has exercised his discretion by refusing to order the commission. *Reg. v. Bishop of Chichester*, 29 L. J. Q. B. 23.

[4] If the bishop is patron of any prefer-

been committed, on the application any party complaining, or of his own mere motion, to issue a commission to five persons, one of whom must be his vicar-general, or an archdeacon or rural dean, who are to inquire into the charge or report, examining the witnesses produced by either party, or summoned by themselves, in order to ascertain whether there is sufficient *primâ facie* ground for instituting further proceedings, and report the result to the bishop. The bishop may, with the consent in writing of the clerk and party complaining, pronounce without further proceedings a sentence not exceeding that which might be pronounced in due course of law.[1] If the commissioners report that there is ground for proceeding articles may be drawn up, and the party cited to appear before the bishop,[2] who, with the assistance of three assessors, hears and determines the cause, and pronounces sentence. Or the bishop may, instead of dealing with the matter himself, send the case by letters of request to the court of appeal of the province, there to be heard and determined.[3] Pending the proceedings, the bishop may inhibit the clerk from performing any services of the church within the diocese. An appeal lies from the bishop to the archbishop, which is heard before the court of appeal of the district, and from the court of appeal where the cause is sent therein in the first instance, to the judicial committee of the privy council.[4]

CINQUE PORTS, Direction of Writs to.[5]

CIRCUITS.[6]

ment held by the party accused, all acts (except sending a letter of request to the court of appeal), and authority otherwise to be done and exercised by him under the act, are to be done and exercised by the archbishop of the province (see *Cooper v. Dodd*, 2 Rob. Ecc. R. 270), who is to proceed in the same manner as the bishop would have done. It is necessary, therefore, that the place at which the accused party is required to appear before him should be within the bishop's diocese. *Reg. v. Archbishop of Canterbury*, 25 L. J. Q. B. 346.

[1] See *Ex-parte Rose*, 18 Q. B. 751.

[2] When the case is sent to the court of appeal after a commission of inquiry, the articles must be confined to offences committed in the diocese from which the cause is sent. *Homer v. Jones*, 9 Jur. 167.

[3] Suits and proceedings must be commenced within two years after the commission of the offence. If the defendant has been convicted of the same offence in a court of common law, it may be brought within six months of the conviction, although more than two years have elapsed since the offence was committed. Sect. 20. If the act complained of was committed twice, the two years begin to run from the last time. *Barnes v. Shore*, 8 Q. B. 640. *Titchmarsh v. Chapman*, 3 Curt. 703. The suit commences with the issue of the citation. *Bishop of Hereford v.* ——, 2 Rob. Ecc. R. 595; 11 Moore, P. C. C. 324; 1 L. T. (N. S.) 199.

[4] The court of appeal is confined to matters decided in the court below. *Craig v. Farnell*, 13 Jur. 217; 6 Jur. N. S. 709, 785.

[5] Formerly writs were directed to the Constable of Dover Castle, but now all writs in the Cinque Ports are directed and executed in the same manner as in other places. 18 & 19 Vic. c. 48, s. 3.

[6] Circuits may be defined to be the periodical progresses of the judges of the superior courts of common law through the several counties of England and Wales, for the purpose of administering civil and criminal justice. These modern circuits or progresses have taken the place of the *eyres* or *itinera* of the ancient system.

The spring circuit usually begins in the month of February, and the summer circuit in July.

Twice, and in some circuits, thrice a-year, viz. soon after the Hilary and Trinity terms, fourteen of the judges make their circuits, distributing themselves into every county. They are called the spring and summer circuits, and, if a third be held, the winter circuit.

The following are the names of the circuits, and the names of the places visited by the judges:—

Midland.—Oakham, Northampton, Leicester and borough, Nottingham and town, Lincoln and city, Derby, Warwick (summer).

Home.—Hertford, Chelmsford, Maidstone, Lewes, Kingston (spring), Guildford or Croydon (summer).

Norfolk.—Aylesbury, Bedford, Huntingdon, Cambridge, Bury St. Edmunds (spring), Ipswich (summer), Norwich and city.

Western.—Winchester, Dorchester, Exeter and city, Bodmin, Taunton, Wells or Bridgewater (summer), Devizes, Bristol.

North Wales.—Welchpool, Bala, Carnarvon, Beaumaris, Ruthin, Mold, Chester and city.

South Wales.—Haverfordwest and town, Cardigan, Carmarthen, Swansea (spring), Cardiff (summer), Brecon, Presteign, Chester and city.

Northern.—Lancaster, Appleby, Carlisle,

CIRCUITY of Action.[1]

CIRCUMDUCTION of the Term.[2]

CIRCUMSTANCE.[3]

Newcastle and town, Durham, York and city, Liverpool.

Oxford.—Reading, Oxford, Worcester and city, Stafford, Shrewsbury, Hereford, Monmouth, Gloucester and city.

The judges on circuit are empowered by the 1 Geo. 4, c. 58, ss. 5, 6; 11 Geo. 4 and 1 Wm. 4, c. 70; 1 & 2 Vic. c. 45, s. 1; 5 & 6 Vic. c. 86, to grant summonses and make orders in causes depending in any of the three superior courts, provided the issues, when sent to trial, would be tried on the circuit on which he is at the time of the application. If, therefore, by order of *nisi prius*, a cause has been referred, it is beyond the power of the judge on circuit to make a second order for the purpose of allowing the defendant to give a notice of set-off, his power having been exhausted by the first order. *Ashworth v. Heathcote*, 6 Bing. 596.

The judges arrange among themselves the distribution of the circuits. Notice is given of the results generally about a month previous to the opening of the assizes. The senior judge, at the first assize town, sits in the Crown Court, and the junior judge in the Civil Court. This order is reversed on reaching the next assize town, and so on alternately to the end of the circuit. Besides the judges, it is usual for some of the senior Queen's counsel or serjeants to be named in the commission, so that in the event of any emergency or pressure, one or other of these may take the place of, or assist the judge in trying causes.

[1] Anciently called circuit of action. Wingate's *Max.* 680; m. 179. The law hateth circuit of action. Finch's *Law*, b. 1, c. 5. *Circuitus est evitandus.* 5 Rep. 31; Wingate's M. 680. A court of law will endeavour to prevent circuity and multiplicity of suits, and where the circumstances of the litigant parties are such that, on changing their relative positions of plaintiff and defendant, the recovery by each would be equal in amount, that fact may be set up by way of plea, and will afford an answer to the action. *Charles v. Alton*, 23 L. J. C. P. 197; 15 C. B. 46. *Turner v. Davies*, 2 Wms. Saund. 150. *Carr v. Stephens*, 9 B. & C. 758. *Penny v. Innes*, 1 C., M. & R. 439. *Hall v. Bainbridge*, 5 Q. B. 242. *Simpson v. Swan*, 3 Camp. 291. A defendant is entitled to set up a cross-demand by way of defence, provided he can show that the sum which he claims to recover back is of necessity the identical sum which the plaintiff is suing for. *Alston v. Herring*, 11 Ex. 822; 23 L. J. Ex. 177. *Bartlett v. Holmes*, 22 L. J. Q. B.; 17 Jur. 858. *Stimson v. Hall*, 1 H. & N. 831. *Bartlett v. Holmes, supra.* But if the cross-claim is for unliquidated damages, and is not necessarily the same amount as that sought to be recovered in the action, it cannot be set up as an answer. *Charles v. Alton*, 23 L. J. C. P. 197; 11 C. B. 56. *Thompson v. Gillesby*, 5 E. & B. 209. *Jackson v. Isaacs*, 3 H. & N. 405. *Atterbury v. Jarvice*, 2 id. 114. *Minshull v. Oakes*, 2 id. 793.

A covenant or agreement not to sue in respect of the cause for which the action is brought, may also be pleaded in bar on the same ground that otherwise there would be a circuity of action. *Willis v. De Castro*, 27 L. J. C. P. 243. *Thimblely v. Barron*, 3 Mee. & W. 210. *Hutton v. Eyre*, 6 Taunt. 289. *Dean v. Newhall*, 8 T. R. 168. And although an agreement not to sue for a limited time cannot be so pleaded (2 Wms. S. 150, a.); yet if such an agreement be accompanied by a condition that if a suit be brought before the time, the right shall be forfeited, such an agreement by virtue of the condition operates as a bar should the plaintiff sue within the time, and it may be pleaded in bar to the action. *Belshaw v. Bush*, 11 C. B. 191.

A contract of indemnity given by the plaintiff to the defendant in respect of the debt sued for may be pleaded in bar with a view to avoid circuity of action; thus, where the plaintiff sued the provisional director of a company to whom he had given an indemnity from all liability in order to induce him to become such director. *Connop v. Levy*, 11 Q. B. 769; 11 Jur. 366; 17 L. J. Q. B. 125.

In an action by the payee against the maker of two promissory notes for 200*l.* and 140*l.*, the defendant pleaded in bar that after the notes became due it was mutually agreed by plaintiff and defendant A., that A. should pay to the plaintiff 25*l.* per annum by quarterly payments, and as long as A. so paid, the right of action on the notes should be suspended, and that A. had hitherto made the quarterly payments.

This plea was held to offer no answer to the action, inasmuch as if plaintiff were barred of his right to sue on the notes, such right would by law be extinguished altogether; which appeared not to be the intention of the agreement, and the defendant was therefore held entitled merely to his right of action on the agreement, if plaintiff had sued on the notes before default made in payment of the annuity. *Ford v. Beech*, 11 Q. B. 852. See *Gibbons v. Vouillon*, 8 C. B. 483. *Webb v. Spicer*, 13 Q. B. 886. *Salmon v. Webb*, 3 H. of L. C. 670.

[2] In Scotch practice. The sentence of a judge declaring the time elapsed within which a proof ought to have been led, and precluding the party from bringing forward any further evidence. Bell's *Dict.*

[3] The terms "circumstance" and "fact" are in many applications synonymous, but the true distinction of a circumstance is its

CIRCUMSTANTIAL Evidence.[1]

See also Evidence.

CITATION.[2]

See Administration, vol. i. p. 160; Dissolution of Marriage; Judicial Separation; Probate; Will.

CITIZEN.[3]

CITY.[4]

CIVIL DEATH.[5]

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relative character. "Any fact may be a circumstance with reference to any other fact." 1 Benth. Just. Evid. 42, n.; id. 142. The force of the term appears in its plural form. Several circumstances are said to stand around (*circum stare*), or surround a principal fact. (Id.)

[1] Evidence derived from circumstances, as distinguished from direct and positive proof. Evidence operating in the way of inference from circumstances, otherwise called indirect or oblique (Vinnius, *Jurispr. Contr.* lib. 4, c. 25), inferential and argumentative evidence. 19 How. *St. Trials*, 33. Frequently termed, from the characteristic process of presumption involved in its application, presumptive evidence; and by some writers, the doctrine of presumption. 3 Bl. Com. 371; 3 Steph. Com. 614, 615, and note. *See* Presumptive Evidence. The latter is frequently used as synonymous with circumstantial in its application to evidence; but it is not so used with strict accuracy. Wills on Circumst. Evid. chap. 2, s. 1. 1 Greenb. on Evid. s. 13. According to Mr. Wills, circumstantial and presumptive evidence differ as genus and species. Wills on Evid. *ubi sup.* All presumptive evidence is circumstantial, because necessarily derived from, or made up of circumstances, but all circumstantial evidence is not presumptive; that is, does not operate in the way of presumption, being sometimes of a higher grade, and leading to necessary conclusions instead of probable ones. (Id.) Best, 246; 1 Tay. Ev. 58. The great peculiarity of circumstantial evidence is its indirect character, it being made to bear upon the principal fact in question (the *factum probandum*), though other and minor, or collateral facts — a fact of this last kind being distinguished as *factum probans*. The following distinctions, made by Mr. Best in his treatise on Presumptions of Law and Fact, may serve to illustrate more fully the nature of circumstantial evidence. When the existence of any fact is attested by witnesses as having come under the cognisance of their senses, or is stated in documents, the genuineness and veracity of which there seems no reason to question, the evidence of that fact is said to be direct or positive. When, on the contrary, the existence of the principal fact is only inferred from one or more circumstances which have been established directly, the evidence (of such principal facts) is said to be circumstantial; and when the existence of the principal fact does not follow from the evidentiary facts as a necessary consequence of the law of nature, but deduced from them by a process of probable reasoning, the evidence and proof are said to be presumptive. Best on Presumptions, 246; id. 12. *See* 1 Greenl. Evid. s. 13.

[2] The process used in the Ecclesiastical Courts to call a party before them. 3 Bl. Com. 100; 3 Steph. Com. 720. It is the first step which is taken in an ecclesiastical cause, and is somewhat analogous to the writ of *capias*, or summons at common law, or the subpœna in chancery. Holthouse. In Scotch practice, the calling of a party to an action done by an officer of court under a proper warrant. Bell's *Dict.* In American practice, an official call or notice to appear in court. Forbes, J. 1; Cushing's R. 529. A co-process used in surrogates' courts, requiring the attendance of parties on the probate of wills.

[3] A freeman, or one who resided and kept a family in the city. Roll. Rep. 138, 149. Every inhabitant is not a citizen. It imports an inhabitant having certain rights and privileges. The term "citizen" in the United States is confined by the constitution to *white* persons. Indians, negroes, are not citizens in America. 19 Howard's R. 393; 4 Cornstock's R. 274. A citizen of the United States, residing permanently in any state, is a citizen of that state. Marshall, C. J.; 1 Brock, R. 389, 391. But a person may be a citizen of a state without being a citizen of the United States. 19 Howard's R. 393.

[4] Lat. *Cite, citie, citee, cytee.* L. Lat, *civitas.* In English law, a town (or borough, Co. Litt. 108 a. b.) incorporated (and usually of principal note or importance, 1 Steph. Com. 115), which either is or has been the see of a bishop. 1 Bl. Com. 114; *Termes de la Ley.* This definition has been made the subject of considerable criticism. Co. Litt. 109, b.; Harg. n. id.; 1 Woodde's Lec. 180; 3 Steph. Com. 193; 1 Man. & G. 1 n.

[5] Lat. *Mors civilis.* That change of a person's civil condition which is produced by certain acts or offences on his part, and which extinguishes his civil rights and capacities, just as natural death extinguishes his bodily existence. It anciently followed on a man's entering into religion (*i. e.* going into a monastery) or abjuring the realm; and is still the consequence of being attainted of treason or felony. Bract. fol. 301 b.; 421 b.; 1 Steph. Com. 132; 1 Bl. Com.

CIVIL LAW.[1]

CLAUSULA.[2]

CLAUSUM.[3]

CLERGY, Benefit of.[4]

CLERGYMEN.

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(B) „ *Tolls*, p. 122.

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(B) *And he cannot carry on any Trade*, p. 122.

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IV. Correction of Clerks in Orders, p. 123.

I. Privileges of.

132; 2 id. 121; 4 id. 380. In New York it follows on a person's being sentenced to imprisonment for life in a state prison. 2 Rev. St. (701), 586, 320. See *Civiliter mortuus*.

[1] Lat. *Jus civile Romanum*. The Roman law, as comprised in the Code, Pandects, Institutes, and novels of Justinian or his successors, constituting together what is termed the *Corpus juris civilis*, as distinguished from the canon and common law. Butler's *Hor. Jurid.* 30; Tayl. *Civ. Law*, 134; 1 Kent's Com. 538, 543.

[2] *Clausula quæ abrogationem excludit ab initio non valet*—A clause (in a law) which precludes its abrogation is void from the beginning. Bacon's *Max.* 77. A clause of this kind is called by Lord Bacon *clausula derogatoria*, or *clausula de non obstante*. Id. 74; Broom's *Max.* 24.

Non impedit clausula derogatoria quominus ab eadem potestate res dissolvantur ei quibus constituuntur—A restraining or precluding clause does not (is of no force to) prevent things (laws or acts) from being dissolved by the same power by which they are made. Bacon's *Max.* 74, regula 19.

Clausula generalis non refurtur ad expressa—A general clause does not refer to things expressed. 8 Co. 154.

[3] L. Lat. from *claudere*. In old English law, Close. A term applied to writs. *Clausum vel apertum*—Close or open. Bract. fol. 188, 372 b. Fleta, lib. 2, c. 13, s. 6. *See* Close. A close. 2 Bl. Com. 209; 1 Salk. 254. Within the close. Bract. fol. 97 b. "The word *clausum* imports possession." 10 Mod. 141. But *see* id. 169, 170.

[4] By the 7 & 8 Geo. 4, c. 28, s. 6, it is enacted, "that benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing herein contained shall prevent the joinder, in any indictment, of any counts which might have been joined before the passing of this act."

The 7 & 8 Geo. 4, c. 27, repeals so much of the statute 25 Edw. 3, st. 3, c. 6 (*vulgò* st. 3), as relates to clerks convicted of treasons or felonies, and to the arraignment of clerks; and also so much of the statute 4 Wm. & M. c. 24, as explains the statute 3 Wm. & M. c. 9; and the whole of the statute 19 Geo. 3, c. 74, except so much thereof as relates to the judges' lodgings; and the whole of the 4 Hen. 7, c. 13; 21 Hen. 3, c. 11; 34 & 35 Hen. 8, c. 14; 3 Wm. & M. c. 9; 6 Anne, c. 9. By the 9 Geo. 4, c. 2, s. 33, which, after reciting, "and whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged," enacts, "that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal, as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction of any other felony."

By the 7 Geo. 4, c. 64, s. 7, felonies without benefit of clergy are provided for under all circumstances consequent on the indictment.

(A) *Freedom from Arrest while Officiating.*

Freedom from arrest while officiating.

By the 24 & 25 Vic. c. 100, s. 36, "whosoever shall, upon any civil process, arrest any clergyman or other minister who is engaged in, or, to the knowledge of the offender, is about to engage in, performing divine service, or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in the burial of the dead; or who, to the knowledge of the offender, shall be going to perform the same, or returning from the performance thereof, shall be guilty of a misdemeanour."[1] *See post*, p. 123.

(B) *Freedom from Tolls.*

By the 3 Geo. 4, c. 126, s. 32, "any rector, vicar, or curate, going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish, is exempted from toll on turnpike-roads." *See post*, Highways.

II. Disabilities of Clergymen.[2]

(A) *Restrained from Farming more than Eighty Acres, unless with the Sanction of his Bishop.*

Restrained from farming more than 80 acres, unless with the sanction of the bishop.

1 & 2 Vic. c. 106, s. 28. "No spiritual person, licensed to perform the duties of any ecclesiastical office whatever, shall take to farm for occupation by himself any lands exceeding eighty acres in the whole, for the purpose of cultivation, without permission in writing by the bishop, specially given for that purpose under his hand, every such permission to specify the number of years, not exceeding seven, for which it is given. Every spiritual person so offending is to forfeit 40*s.* for every acre above eighty acres for each year of such occupation and cultivation."

(B) *And he cannot carry on any Trade.*

And he cannot carry on any trade.

1 & 2 Vic. c. 106, s. 29. "No spiritual person, licensed to perform the duties of any ecclesiastical office whatever, shall trade or deal for gain or profit in any goods, unless such trading or dealing shall be carried on by more than six partners, or unless such trading or dealing shall have devolved on him by devise, bequest, inheritance, settlement, marriage, bankruptcy, or insolvency; but in no case shall he act as director or managing partner, or carry on such trade in person."[3]

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[1] Notwithstanding this prohibition, if the arrest be under valid civil process such arrest will, it seems, itself be valid, although the officer will be exposed to punishment; and therefore it was held, notwithstanding the 9 Geo. 4, c. 31, s. 23, a similar enactment, that where the officer, immediately after the arrest, discharged the debtor, he was liable to an action for an escape. *Tarlton v. Fisher*, Dougl. 671. *See* Wats. Ch. 34. An action may also, it appears, be maintained by the clergyman against the wrongdoer. Com. Dig. Temps, b. 3. *Tarlton v. Fisher, supra.* If the arrest be upon criminal process, the privilege cannot be claimed. Cro. Jac. 321.

[2] Clergymen or dissenting ministers cannot be electors, councillors, or aldermen of any borough (5 & 6 Wm. 4, c. 76, s. 28), or members of the House of Commons. 41 Geo. 3, c. 73.

Clergymen are exempted from serving on juries. 6 Geo. 4, c. 50, s. 2. And are not compellable to serve as sheriff, constable, or overseer of the poor. Degge, p. 120.

[3] Certain other exceptions are specified in the 30th section in the cases of spiritual persons engaged in education, and with respect to articles *bonâ fide* bought to be consumed in the family, though in part sold at an advanced price, or of books sold by means of a bookseller and publisher; or if, being director, partner, or shareholder in any benefit or fire or life-assurance society, or of buying or selling articles necessary for his glebe or demesne lands, or selling the produce of his mines. But no spiritual person is to buy or sell in any market, fair, or place of public sale. In case of a trading or dealing contrary to the act, the spiritual person may be cited by the bishop before a competent judge. The penalty is, for the first offence, suspension for a period not exceeding one year; for the second offence, suspension for such period as the judge shall think fit; for the third offence, deprivation.

The 31st section contains a proviso that "no contract shall be deemed to be void by reason only of having been entered into by a spiritual person trading or dealing con-

III. Obstructing or Assaulting.

By 24 & 25 Vic. c. 100, s. 36, "whosoever shall by threats or force obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial-place, or shall strike or offer any violence to, or shall upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in any of the rites and duties in this section aforesaid, or who, to the knowledge of the offender, shall be going to perform the same, or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."

IV. Correction of Clerks in Orders.[1] *See* p. 117, Church Discipline Act.

CLERK. *See* Counsel; Ecclesiastical Persons; Judge's Clerk.

CLERK, Articled. *See* vol. i. p. 546; vol. ii. p. 5.

CLERK, Attorney's.

Communications to Privileged.

Taylor v. Foster, 2 C. & P. 195.

Per Best, C. J. "The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself." So as to a barrister's clerk. *Foote v. Hayne*, R. & M. 165.

CLERK, Embezzlement by. *See post*, Embezzlement. *See* 24 & 25 Vic. c. 96, s. 68.

CLERK, Larceny by. *See post*, Larceny. *See* 24 & 25 Vic. c. 96, s. 67.

CLERK of Arraigns.[2]

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trary to the provisions of this act; but every such contract may be enforced by and against such spiritual person, either solely or jointly with any other person or persons, as the case may be, in the same way as if no spiritual person had been party to such contract." The contract is valid notwithstanding the person with whom it was made was at the time aware that the other party was a spiritual person holding a benefice. *Lewis v. Bright*, 4 E. & B. 917; 24 L. J. Q. B. 191.

[1] Clergymen are subject to punishment for irregularities in the discharge of their duties, or promulgating doctrines contrary to the Articles of the Church. The modes of punishment are admonition, suspension, degradation, or deprivation.

Suspension is from office and benefice jointly, or from office or benefice singly, and is a temporary degradation or deprivation, or both. 3 Burn's Ecc. L. 667. A decree of suspension regularly enforced operates while it endures as if the clergyman were dead, or absolutely removed from his benefice. *Bunter v. Cresswell*, 14 Q. B. 825. The bishop may annex to a decree of suspension the necessity of the clerk at the expiration of the time specified obtaining a certificate of good behaviour, to the satisfaction of the bishop, previous to the removal of the suspension. *Ex-parte Rose*, 18 Q. B. 751. *Bishop of Lincoln v. Day*, 1 Rob. Ecc. R. 724.

Degradation is an ecclesiastical censure, whereby a clergyman is deprived of the holy orders he formerly had. Gibs. 1066.

Deprivation is an ecclesiastical sentence, whereby a clergyman is deprived of his parsonage or other spiritual promotion. The advisedly maintaining doctrines contrary to the Thirty-nine Articles, and persisting therein, is a ground of deprivation. *R. v. Stow*, 1 Hagg. 424. *See* Cro. Jac. 57. Irregularity of life, drunkenness, incontinence; conviction of felony or perjury, are grounds of deprivation. *See* Rogers's Ecc. L. 303; Gibs. Cod. 1116.

[2] The duty of the clerk of the arraigns consists of three parts: 1st, in calling the prisoner to the bar by his name, and commanding him to hold up his hand; 2d, reading the indictment to him distinctly in English, that he may understand the charge; and, lastly, demanding of him whether he is guilty or not, and asking him how he will be tried. *See* 2 Hale, P. C. 219; 4 Harg. *St. Tr.* 777.

CLERK of Assize.[1]

CLERK of Assize, Fees of.[2]

CLERK of Nisi Prius.[3]

CLERK of the Parish. *See* Parish Clerk.

CLERK of the Peace. *See* Evidence; Justice of the Peace; Office.

I. Of the Choice and Swearing of, p. 124.
II. Duties of, p. 124.
III. Rights of, p. 124.
(A) *As to Fees*, p. 124.
IV. Liabilities of, p. 125.
V. Disabilities of, p. 126.
VI. Of Displacing or Removing of, p. 126.

I. Of the Choice and Swearing of.[4]

The *custos rotulorum* appoints the clerk of the peace.

The *custos rotulorum* shall appoint an able and sufficient person, residing in the county or division, to execute the office of clerk of the peace, by himself or his sufficient deputy (to be allowed of by the said *custos rotulorum*, 37 Hen. 8, c. 1), and to take and receive the fees, profits, and perquisites thereof, for so long a time only as such clerk of the peace shall well demean himself in his said office. 1 Wm. & M. c. 21, s. 5.

II. Duties of.

It is the duty of the clerk of the peace[5] to certify outlawries; deliver estreats to the sheriff; and into the Exchequer.

By the 34 & 35 Hen. 8, c. 14, the clerk of the peace shall certify into the King's Bench the names of such as be outlawed, attainted, or convicted of felony.

By 22 & 23 Car. 2, c. 22, he shall deliver to the sheriff within twenty days after 29th September, yearly, a perfect estreat or schedule of all fines and other forfeitures in sessions.

And by the 22 & 23 Car. 2, c. 22, the clerk of the peace shall yearly, on or before the second Monday after the morrow of All Souls, deliver into the Court of Exchequer a perfect duplicate certificate of estreats of fines, &c., on pain of forfeiting 50*l.*, half to the king, and half to him that shall sue.

III. Rights of.

(A) *As to Fees.*[6]

[1] The clerk of assize writes all judicial proceedings done by the justices of assizes on the circuits (*see* Cromp. Juris. 227); and he is interdicted from acting as counsel. *See* 33 Hen. 8, c. 24. As to fines for falsely recording appearances of persons returned on a jury, *see* 3 Geo. 2, c. 25, s. 3.

A clerk for assize has no lien on the records of his fees. *Rose v. Bury*, 1 Leach, C. L. 201.

[2] The stat. 15 & 16 Vic. c. 73, s. 10, authorised the commissioners of her Majesty's Treasury to prepare a table of fees proper to be taken by the clerks of assize acting as associates on circuit. Such a table was issued, and became law, after being published in the *London Gazette*, pursuant to an order of the Treasury on the 24th of February, 1853, and all other fees were thenceforth abolished. The table is identical with the table of fees authorised to be taken in the offices of the Associates. *See* vol. i. p. 574, where that table is given.

[3] This officer is appointed by the *custos brevium* for all counties except Westminster and the city of London; and for the latter places he is nominated by the Chief Justice.

[4] By 1 Wm. & M. c. 21, the clerk of the peace is to take the oaths of allegiance, supremacy, and abjuration, and to perform such requisites as other persons who qualify for offices, and swear that he has not, directly or indirectly, given money for the appointment. The appointment is good though it be made without deed. *Saunders v. Owen*, 2 Salk. 467.

[5] To issue processes, to record the proceedings of the sessions, and to fulfil various duties, enjoined by different statutes, which are noticed under the titles to which they respectively relate.

[6] The 57 Geo. 3, c. 91, after reciting that

IV. Liabilities of.

Rex v. May, 1 Leach, C. L. 201, n.

The court referred an indictment for perjury against May, which had been removed from Hick's Hall to the master, to see what part of the record was unnecessary, and made an order that the clerk of the peace should pay the expense incurred by such unnecessary part.

If a clerk of the peace draw an indictment with unnecessary prolixity, he may be ordered to pay the extraordinary expense.[1]

Anon. cited 2 Dick. J. 362.

A criminal information was moved for against a clerk of the peace, for that

But he is not

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doubts have arisen touching the fees and allowances due and to be made to the clerks of the peace of the several counties and other divisions in England and Wales, enacts, that the justices of the peace for Kent and Lancaster at their annual general sessions, and the justices of the peace in every other county, riding, division, city, town, liberty or precinct, within England and Wales, at their respective general quarter sessions of the peace, are empowered to ascertain, make, and settle a table of fees and allowances to be taken by the clerk of the peace, which shall be subject to the approbation of the justices of the peace at the then general annual session and general quarter session, or at some adjournment thereof; and such table of fees, when so approved, shall be laid before the judges of assize at the next assizes for such counties and places respectively, except the several places being counties, in which assizes are not constantly or regularly holden in every year, and in those cases before the justices at the next assizes for the adjoining county, where assizes are constantly and regularly holden, and to which prisoners are generally removed for trial from such places respectively, and also except the counties in Wales, and the county palatine of Chester, and before the justices at the next great sessions for the several counties in Wales, and for the county palatine of Chester; and the said judges and justices respectively are hereby authorised to ratify and confirm such tables respectively, either as settled and approved as aforesaid, or with such alterations, additions, and improvements, as to them shall appear to be just and reasonable; and the justices in sessions are also empowered from time to time to make other table of fees and allowances, to be improved, and afterwards ratified and confirmed in like manner.

By sect. 3, every such table of fees and allowances shall be deposited with the clerk of the peace, and an exact written or printed copy shall be placed and constantly kept in a conspicuous part of every room or place wherein any general or quarter sessions of the peace for such county or place shall be held; and if any clerk of the peace, or person acting as such, shall neglect to cause every such copy to be so placed and constantly kept, he shall forfeit to any person who shall sue for the same the sum of 5*l.*

By sect. 2, any clerk of the peace, or any person acting as such, demanding or receiving any other or greater fee or allowance than that which shall be so settled and confirmed, shall forfeit the sum of 5*l.* to any person who shall sue for the same in any of his Majesty's courts of record at Westminster.

And by sect. 4, all actions shall be brought before the end of three calendar months after the offence committed. *See* 55 Geo. 3, c. 50.

Previous to this statute the fees of this officer were dissimilar in different counties, and were regulated by custom and usage; except where by modern statutes specific remunerations were limited for a few particular dues.

The clerk of the peace is not bound to enter judgment or the like at the suit of any person, without having the fee due for the same; but if the court order anything not at the suit of another, as *ex officio*, then he ought to enter the same without having any fee. *See* Cromp. 159.

By the 14 & 15 Vic. c. 58, s. 9, the justices are empowered to recommend to the Secretary of State that the clerk of the peace shall be paid by a stated fixed salary, whereupon an order may be made to that effect, and the fees to be received for the future by him will in that event be paid over to the county treasurer. *See* 18 & 19 Vic. c. 126, s. 18.

An order of sessions abolishing the fees of the clerk of the peace is an order of a judicial nature, removable by *certiorari*. Fees, such as traverse fees, which have been duly allowed and confirmed pursuant to 57 Geo. 3, c. 91, and which are not abolished by 8 & 9 Vic. c. 114, cannot be abolished by the mere order of quarter sessions. *R. v. Coles*, 8 Q. B. 75.

[1] And if he shall spare, take off, discharge, or conceal any fine or forfeiture, unless it be by rule of court, he shall forfeit treble value, half to the king and half to him that shall sue; and shall also lose his office, and be for ever incapable to be employed in any office where the revenue is concerned. And, moreover, he may be amerced for not returning his estreats by the barons of the Exchequer. *See* 3 Geo. 1, c. 15.

liable to a criminal information for refusing to draw indictments.

he, being also a clerk of indictments, refused to draw an indictment, in pursuance of instructions delivered, and a tender of the usual fees.

Per Cur. Unless some corrupt motive be alleged, the Court of B. R. has no authority to interfere in a summary way. Neglect of duty may be a good ground for indictment, but not for special interference. Besides, cases may frequently occur why a clerk of the peace may justifiably refuse to draw an indictment, in consequence of the difficulties of the case, and incompetency cannot be a ground for an information.

V. Disabilities of.

A clerk of the peace is disabled from acting as an attorney.

By 22 Geo. 2, c. 46, s. 14, no clerk of the peace, or his deputy, shall act as solicitor, attorney, or agent, or sue out any process at any general or quarter sessions, where he shall execute the office of clerk of the peace or deputy, on pain of 50*l.* to him who shall sue for the same within twelve months, with treble costs.

VI. Of Displacing or Removing of.

The clerk of the peace may be displaced for misbehaviour.[1]

By 1 Wm. & M. c. 21, if any clerk of the peace shall misdemean himself in the execution of his office, and thereupon a complaint and charge in writing of such misdemeanor shall be exhibited against him to the justices in session, the said justices may, on examination and due proof thereof, openly, in the said session, suspend or discharge him from the said office; and in such case the *custos rotulorum* shall appoint another able and sufficient person, residing in the said county or division, to be clerk of the peace. And in case of refusal or neglect to make such appointment before the next general quarter session, the justices in session may appoint one.

CLUBS.[2] Rules—Liability of Members.

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[1] As for refusing to deliver the rolls, &c. to the *custos rotulorum* (*Rex v. Evans*, 4 Mod. 31; 1 Show. 282; *semb. contra*, 12 Mod. 13); or for exaction (*Reg. v. Baines*, 2 Ld. Raym. 1265; 6 Mod. 192; Holt, 514). But he is not removable by a *succeeding custos rotulorum*, since he has a freehold in his office. *Harcourt v. Fox*, 12 Mod. 42; 1 Show. 426; Comb. 209; 1 Ld. Raym. 161; 11 Mod. 80. Therefore, if he be appointed as *directed* by the 1 Wm. & M., the court, on his being displaced, will grant a *mandamus* to restore him. *Rex v. Owen*, 4 Mod. 293; 5 id. 314; S. C. Comb. 399; 1 Sid. 669; Holt, 190.

An order of sessions removing a clerk of the peace need not set out the evidence. *Rex v. Lloyd*, 2 Stra. 996 (*Reg. v. the Clerk of the Peace of Cumberland*, 11 Mod. 81); but such an order must show that a charge was exhibited sufficient to warrant his removal. *Rex v. Baines*, 2 Ld. Raym. 1265; 2 Salk. 681; 6 Mod. 193.

[2] Any society of this description may make rules by which the admission and expulsion of its members are to be regulated, and members must conform to those rules; but where there is no rule as to expulsion, the majority may by resolution remove any member: but before that is done notice must be given to him to answer the charge, and an opportunity given to him for making his defence. *Innes v. Wylie*, 1 C. & Kir. 257.

A club is not a company within the meaning of the Joint-Stock Companies' Winding-up Act (12 & 13 Vic. c. 108), that act pointing at "associations" established for profit. *In re St. James' Club*, 2 De Gex, Man. & G. 383; 16 Jur. 1075.

One of the rules of a club was in these words: "All the concerns of the club, the domestic and other arrangements and regulations for its establishment and management, shall be conducted by a committee of sixteen members." *Semble*, that this did not authorise the committee to raise money by debentures, or otherwise to pledge the credit of members.

The society of a club, through their committee, employed the defendant to make alterations in their club-house, and by the misconduct of the defendant's agent an accident occurred. *Quære.* Is the society answerable as principal, and is the defendant free as intermediate agent? *Rapson v. Cubitt*, Car. & M. 64: *Abinger.*

Managing committees of clubs are personally responsible for the payment for goods supplied to, work done for, and the wages of servants of the club, by their order, as the credit is deemed to have been given to the committee, and not to the subscribers at large, who are a fluctuating body, unknown individually to the persons executing the orders. *Cullen v. Duke of Queensbury*, 1 Bro.

FLEMYNG v. HECTOR, 2 Mee. & W. 172.

Responsibility of a member of a club for goods supplied for the use of the club.

Actions were brought against the members of a club for work done and goods supplied for the use of the club upon the order of the committee. The facts were found at the trial, and the question of liability reserved for the court.

Lord Abinger, C. B. "It is a question here how far the committee who are to conduct the affairs of the club as agents are authorised to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large, and that depends on the constitution of the club, which is to be found in its own rules, and upon two of the cases which were tried before me at Guildford. Looking at these general rules, it does strike me that it is impossible to interpret them so as to give the committee the power of dealing on credit, even for the purposes of the club. It appears by the rules that every member is to pay his subscription of ten guineas as entrance-money before he can become a member, and a yearly subscription of five guineas, so that by the provisions of the club there is to be a fund in hand in order to bear the expenses. But then, again, every member who makes use of the club, who either eats or drinks there, or takes any sort of refreshment, is to pay ready money. That shows again that the club was not disposed, and not intended to have any transactions on credit, even with its own members; and it also shows that care was taken to provide ready money to meet every expense: so that if a party or a gentleman of the club were to order any particular thing that the club did not contain, he is to pay for it instanter, so that no occasion was expected to be necessary for the committee's pledging the credit of the club, or even their own."

COAL, Stealing from Mines. *See post*, Larceny; Mines; and 24 & 25 Vic. c. 96, ss. 38, 39.

COALS. *See* City of London Coal Acts.[1]

P. C. 404; 1 Bro. C. C. 101. *Burls v. Smith*, 7 Bing. 705; 5 M. & P. 735. *Glenester v. Hunter*, 5 C. & P. 65. But if individual members of the club concurred in or assented to the orders given, knowing at the same time that the funds of the club were insufficient, they will be responsible. And if the managing committee of a club allow the steward or secretary, or one of the members of the committee, to discharge the functions of the whole body, to order supplies of goods, or hire workmen and servants for the use of the institution, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit. But they are not responsible upon his bills of exchange or for the payment of money borrowed by him. *Earl Mountcashel v. Barber*, 14 C. B. 53; 23 L. J. C. P. 43. The committee are not responsible for contracts made by the secretary or one of their members out of the ordinary course of business, and without their knowledge. And if goods have been supplied upon the order of one member only of the committee of management, if it is sought to charge any other member, it is a question for the jury whether they were supplied upon the personal and individual credit of the person who ordered them, or with the authority and upon the credit of the committee. *Todd v. Emly*, 7 Mee. & W. 427; 8 id. 505; 12 L. J. Ex. 336.

Where the rules of a club are contained in a book openly kept by the proper officer or servants of the club, every member of the club must be presumed to be acquainted with them. *Raggett v. Musgrave*, 2 C. & P. 556; and *see* 1 Stark. 405; 1 Phill. Ev. 252, 6 ed. And the members are not partners, so as to prevent a member from suing a manager for goods ordered by him. *Caldecott v. Griffiths*, 8 Ex. 898.

[1] For the local London acts relating to coal, *see* 1 & 2 Wm. 4, c. 176, and 1 & 2 Vic. c. 101; 8 & 9 id. c. 101, s. 1; 14 & 15 id. c. 1, s. 2.

The neglect to deliver a ticket pursuant to 1 & 2 Vic. c. 101, s. 3, is a good plea in bar to an action for the price of the coals. *Cundell v. Dawson*, 4 C. B. 376; 17 L. J. C. P. 311. *Little v. Poole*, 9 B. & C. 200. *See* M'Clel. & Y. 119. It is not a legal weighing under the 1 & 2 Wm. 4, c. 176, to weigh each sack of coals in one scale against weights in the other scale equal to the proper weight of a sack of coals, together with an empty sack. *Meredith v. Holman*, 16 Mee. & W. 798. And it has been held under the 76th section of the same act, that where several sacks

COALWHIPPERS. *See* 14 & 15 Vic. c. 78.

COCKBOTE. *See* Common.

COCK-FIGHTING. *See* vol. i. p. 358.

CODICIL, Stealing, Destroying, or Obliterating, 24 & 25 Vic. c. 96, ss. 29, 30. *See post*, Will.

COGITATIONIS pœnam nemo patitur. (D. 48, 19.) *A man will not be punished for a mere thought.*[1]

COGNOVIT Actionem.

(A) *What it is, and when Given*, p. 128.
(B) *Form of*, p. 129.
(C) *Stamp on*, p. 129.
(D) *Attestation of*, p. 129.
(*a*) *Must be by an Attorney acting on behalf of the Debtor*, p. 129.
(E) *Filing of*, p. 130.
(F) *Signing Judgment on*, p. 130.
(G) *Costs*, p. 131.
(H) *Execution*, p. 131.
(I) *Setting aside Cognovit*, p. 131.

(A) *What it is, and when Given.*[2]

were sent out to a purchaser at the same time under one contract, one penalty only is incurred in respect of a deficiency in weight, though every sack is so deficient; and therefore, where seventeen sacks were so found deficient that the penalties were recoverable by action of debt in one of the superior courts, notwithstanding sect. 77, which directed that all penalties imposed by the act not exceeding 25*l.* shall be levied and recovered before justices of the peace. *Collins v. Hopwood*, 15 Mee. & W. 459. Under sect. 47 of the 1 & 2 Wm. 4, c. 76, it was necessary to deliver a seller's ticket to the purchaser under a penalty of 20*l.*, but since the 1 & 2 Vic. c. 101, which repealed so much of the former act as relates to sellers' tickets, no action can be brought by the buyer for the penalty where no seller's ticket is delivered. *Mercdith v. Holman*, 16 Mee. & W. 798. Add. *Cont.* 109.

No delivery ticket is necessary under the 1 & 2 Vic. c. 101, s. 4, where the coals are delivered to a purchaser direct out of the vendor's ship at the purchaser's wharf, without the intervention of any lighter, barge, or other craft. *Blandford v. Morrison*, 19 L. J. Q. B. 533. Probably the section would not apply to the case of a purchaser who made use of his own barges or lighters to receive the coals from the vendor's coal-brig. (Id.)

[1] So long as an act rests in the bare intention it is not punishable. *Les lois ne se charge de punir que les actions extérieures.* Montesq. *Esprit des Lois*, b. xii. c. 11. In the case of treason, however, the old maxim, *Voluntas reputatur pro facto* (3 Inst. 569), "The will is taken for the deed," is said to apply to its full extent; by which, however, we must understand, that if a treasonable design be entertained, and if any overt or open act be done towards effectuating such design, then the mere imagination of the heart is in contemplation of law as guilty as it would have been if carried into actual execution. Even in this case, however, the mere treasonable intention, to wit, the compassing and imagining the death of the sovereign, although strictly charged in the indictment as the substantive treason, cannot be brought within legal cognisance unless accompanied by overt acts, which furnish the means and evidence whereby the intention may be made manifest. 1 East. P. C. 58: 7 & 8 Wm. 3, c. 3, s. 8. Broom's *Max.* 279.

[2] When an action has been commenced against the defendant, who wishes to offer no defence, but requires time to pay, it is usual for him to give the plaintiff a cognovit, which is a written confession of the action, and an authority to the plaintiff to enter up judgment on certain terms. Sometimes the defendant's pleading partly implies a confession of the action, as where he is sued as

(B) *Form of.*[1]

(C) *Stamp on.*[2]

(D) *Attestation.*

(*a*) *Must be by an Attorney acting on behalf of the Debtor.*

1 & 2 Vic. c. 110, s. 9.[3] "No warrant of attorney to confess judgment in Must be by an attorney acting on behalf of the debtor.

executor or administrator, or pleads *plene administravit*. *See* Executors. So where the defendant allows judgment by default he impliedly confesses the action. *See* Judgment by Default. A cognovit, however, is an express confession, and is given on terms which must be stated on the face of it, otherwise they will be disregarded by the court. *Anon.* 1 Salk. 400. *Anon.* 7 D. & R. 375. The party in such case is left to his action on the agreement, unless under special circumstances. *Dillon v. Brown*, 6 Mod. 14. *Hatton v. Young*, 2 W. Black. 943. It generally stipulates to take no advantage by way of error, or of filing a bill in equity, or setting aside for irregularity, or requiring *scire facias* (see *Shaw v. Marquis of Worcester*, 6 Bing. 387; 4 M. & P. 21; *see* 25 L. J. Q. B. 332), which is a valid stipulation (*Webb v. Taylor*, 1 D. & L. 676. *Best v. Gompertz*, 2 C. & M. 427; 2 Dowl. 395), at least against the defendant (*Shenran v. Marshall*, 1 D. & L. 689. *Tripp v. Stanley*, 5 id. 262. *Morgan v. Burgess*, 1 Dowl. N. S. 850), though not perhaps against his representatives. *Heath v. Brindley*, 2 Ad. & E. 368. *Mann v. Audley*, 5 Dowl. 596. The defeasance, as in the case of a warrant of attorney, must be written on the same paper or parchment, in order to comply with the Bankrupt Act (*ante*, vol. ii. p. 236). The cognovit may be given at any stage of the cause, but not before the action is commenced. *Shanley v. Colwell*, 6 Mee. & W. 543; 8 Dowl. 373. It is void if given by a bankrupt within two months before the bankruptcy. 12 & 13 Vic. c. 106, sec. 135. *See* vol. ii. p. 236. It may be given before service of the writ (*Kirby v. Jenkins*, 2 Tyr. 499. *Wade v. Smith*, 8 Price, 513), or after the time limited for service thereof. *Richardson v. Daly*, 4 Mee. & W. 384; 7 Dowl. 25. It is generally given after the declaration. *Clarke v. Jones*, 3 Dowl. 277. And if after the plea, it provides for withdrawing such plea; in which case it is called a *cognovit actionem relicta verificationis*. A cognovit, like a warrant of attorney, cannot be given by an infant (*Oliver v. Woodroffe*, 4 Mee. & W. 650; 7 Dowl. 166), or *feme covert* (*Fairthorne v. Blaquire*, 6 M. & S. 73). Where several join in giving a cognovit, the signature of the first is the date from which it speaks. *Perry v. Turner*, 2 C. & J. 89; 1 Dowl. 300.

[1] No particular form is necessary, and a deed may in substance be a cognovit. *Hurst v. Jennings*, 5 B. & C. 650. The following is the usual form :—

Form of Cognovit.

In the Q. B. [*or* C. P., *or* Exch. of P.]
Between A. B. Plaintiff,
and
C. D. Defendant.

I confess this action, and that the plaintiff is entitled to recover in it £ which sum the plaintiff is entitled to recover against me in this action, besides the costs of suits, to be taxed by one of the Masters [*or* to the amount of £], and in case I shall make default in payment of the said sum of £ together with the said costs, on the day of next, the plaintiff shall be at liberty to enter up judgment for the said sum of £ together with the said costs, and also the costs of entering up such judgment, and registering the same, and shall also be at liberty thereupon forthwith to sue out execution for the said sum and costs. And I undertake not to take any proceedings, either in error in this action or in equity, nor do any other matter or thing to delay the said plaintiff from entering up judgment or suing out execution therein, as aforesaid; also that it shall not at any time, or in any event, be necessary, previous to issuing the said execution, to revive the said judgment. Dated, &c. C. D.

Signed by the above-named C. D. in my presence, and I declare myself to be attorney for the said C. D., and that I subscribe my name as such attorney.

[2] No stamp is necessary unless the cognovit contains some term of agreement, and the debt is above 5*l.*; where, however, there is an agreement above that amount, as to pay by instalments (*Ames v. Hill*, 2 B. & P. 150. *Morley v. Hall*, 2 Dowl. 494), or to postpone the day of payment (*Pitman v. Humphries*, 2 Tyr. 500), it must be stamped as an agreement. Where the cognovit contains a stipulation not to take advantage of its being before declaration, this is no agreement in that sense (*Green v. Gray*, 1 Dowl. 350); nor where it merely gives the defendant time. *Jay v. Warren*, 1 C. & P. 532. The cognovit may be stamped after execution, on payment of the penalty of 10*l.* (12 & 13 Vic. c. 97, s. 12), though in the mean time a summons may have been taken out to set it aside; which will, in that case, be discharged without costs. *Brembridge v. Wildman*, 1 Dowl. N. S. 774.

[3] The statute applies, although the cognovit is executed out of the jurisdiction of the court. *Davies v. Trevannion*, 2 D. & L. 743. The attorney who attests may be uncertificated. *Holdgate v. Slight*, 2 L. M. & P. 662; S. P. 7 Q. B. 838. And it is not necessary that he should be an attorney of the court in which the judgment is to be signed. *Vilmot v. Barry*, Barnes, 44. An attorney's clerk cannot attest. *Paul v. Cleaver*, 2 Taunt. 360. *Barnes v. Ward*, Barnes, 42. An attestation by a person not an attorney, although *bonâ fide* believed and represented to be so by the

any personal action, or a *cognovit actionem* given by any person, shall be of any force, unless there shall be present some attorney of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney."

Id. s. 10. "A warrant of attorney to confess judgment or *cognovit actionem* not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same."

(E) *Filing of.*

The cognovit must be filed in order to its validity against bankrupts, as stated vol. ii. p. 236.

(F) *Signing Judgment on.*

Before signing judgment the

Reg. Gen. (Pr.) H. T. 1853, r. 25. "No judgment shall be signed upon any cognovit or any warrant of attorney without such cognovit or warrant being

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defendant, is insufficient (*Wallace v. Brockley*, 5 Dowl. 695), but if the defendant *malâ fide* represented him to be an attorney, the court may refuse to set aside the judgment. *Cox v. Cannon*, 6 Dowl. 625; 4 Bing. N. C. 453. *Jeyes v. Booth*, 1 B. & P. 97. If the cognovit be given by an attorney, attestation is unnecessary. *Chip v. Harris*, 5 Mee. & W. 430. *Downes v. Garbutt*, 2 Dowl. N. S. 939. The attorney must be present on behalf of the defendant, or of the several defendants; and the plaintiff's attorney will not suffice, notwithstanding the defendant has consented to his acting. *Haigh v. Frost*, 7 Dowl. 743. *Cooper v. Grant*, 12 C. B. 154. *Mason v. Kiddle*, 5 Mee. & W. 513; 8 Dowl. 207. *Prior v. Swaine*, 2 D. & L. 37. *Joel v. Dicker*, 5 id. 1. *Hirst v. Hannah*, 17 Q. B. 557. *Sanderson v. Westley*, 6 Mee. & W. 98. It is in general necessary that the attorney should attend at the positive request of the defendant, for it must appear that the defendant exercised a free choice. However, if the defendant, finding an attorney present, adopt him for the occasion, this, in the absence of fraud, will suffice. *Levinson v. Tyer*, 2 L. M. & P. 557. *Hale v. Dale*, 8 Dowl. 599. *Walton v. Chandler*, 1 C. B. 306; 2 D. & L. 802. And the attestation will not be vitiated by the circumstance that in such a case the attorney has been paid for his attendance by the plaintiff. *Pease v. Wells*, 8 Dowl. 626. But in all these cases the defendant must have had a fair opportunity for exercising his discretion. *Rice v. Linsted*, 7 Dowl. 153; id. 747. *Gripper v. Bristow*, 6 Mee. & W. 807. The attorney should read over the instrument to the defendant (*Oliver v. Woodroffe*, 4 Mee. & W. 650; 7 Dowl. 166. *James v. Harris*, 6 Dowl. 184. *Taylor v. Parkinson*, 2 H. Bl. 383), and explain to him its nature and effect. *Joel v. Dicker*, 5 D. & L. 1. The default of the attorney to inform the defendant in this respect will not make void the instrument, unless it is in furtherance of a design of fraud, or in collusion with the plaintiff. *Taylor v. Nicholls*, 6 Mee. & W. 91. *Haigh v. Frost*, 7 Dowl. 743.

The attestation clause should show that the requirements of the statute have been complied with, either by express statement (*Hibbert v. Barton*, 10 Mee. & W. 678; 2 Dowl. N. S. 434) or necessary implication, should the exact words of the statute not be used. *Phillips v. Gibbs*, 16 Mee. & W. 208. *Pocock v. Pickering*, 18 Q. B. 784. *Lewis v. Lord Kensington*, 2 C. B. 463; 3 D. & L. 637. *Elkington v. Holland*, 9 Mee. & W. 659; 1 Dowl. N. S. 643. It should state that the attorney attends as such. *Potter v. Nicholson*, 8 Mee. & W. 294; 9 Dowl. 808. See *Lindley v. Girdler*, 1 D. & L. 699. *Ledgard v. Thompson*, 11 Mee. & W. 40. The attestation has been held sufficient, though it did not expressly state that the attorney was appointed by the defendant (*Oliver v. Woodroffe*, 7 Dowl. 166), or was named by him, and attended at his request (*Gay v. Hall*, 5 D. & L. 422), or did not describe him to be an attorney of one of the superior courts, or declare that he subscribed as defendant's attorney. *Phillips v. Gibbs*, 16 Mee. & W. 208. *Holt v. Kershaw*, 5 D. & L. 419. *Knight v. Hasty*, 12 L. J. Q. B. 293. Where, however, the attestation did not show with certainty that he was the defendant's attorney, and attested as such, it was held insufficient. *Hibbert v. Barton*, 10 Mee. & W. 678; 2 Dowl. N. S. 434. *Everard v. Popleton*, 5 Q. B. 181. It is not necessary that the attorney should sign his name at the foot of the attestation clause. *Lewis v. Lord Kensington*, 2 C. B. 463. If insufficiently attested, a second attestation may be added. *Ledgard v. Thompson*, 11 Mee. & W. 40; 2 Dowl. N. S. 766.

delivered to and filed by the master, who is hereby ordered to file the same in the order in which it is delivered." cognovit must be filed.[1]

(G) *Costs.*[2]

(H) *Execution.*[3]

(I) *Setting aside Cognovit.*[4]

COHABITATION, Liability resulting from.

See Husband and Wife; Judicial Separation.

Watson v. Threlkeld, 2 Esp. 637.

Per Lord Kenyon. "If a man has permitted a woman to whom he was not married to use his name and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew of the circumstance or not. He gives her a credit from his name and cohabitation, and it is not to be supposed that the tradesman would look to the credit of a woman of that description, and not to that of the man by whom she was supported. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having carnally known him; it must be where the man permits the woman to use his name, where she lives in his house, and forms part of his family."[5]

COIN, Offences relating to.

I. Counterfeiting the Gold or Silver Coin, p. 132.

II. Colouring Counterfeit or Genuine Coin, p. 134.

III. Impairing the Gold or Silver Coin with Intent, p. 135.

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[1] Judgment must be signed in pursuance of the cognovit; and if no time is specified, then the plaintiff can sign judgment at any time (*Calvert v. Tomlin*, 5 Bing. 1; 2 M. & P. 1), though no step has been taken for a year (*Thompson v. Langridge*, 1 Ex. 351). It is a question of construction what the cognovit authorises, and what is meant by "failure to pay by instalments" (*Barrett v. Partington*, 4 Bing. N. C. 487; 7 Dowl. 447. *Rose v. Tomlinson*, 3 Dowl. 49), "on the final hearing of a Chancery suit" (*Jones v. Reynolds*, 1 Ad. & E. 384; 3 Nev. & M. 465), "on payment of the debt and costs." *Booth v. Parker*, 3 Mee. & W. 54; 6 Dowl. 87. Parol evidence cannot be allowed to alter the terms of the cognovit. *Woodman v. Ford*, 2 Jur. 1. Judgment cannot be regularly signed after the defendant's tendering the amount. *Anon.* 1 Dowl. 173. Before signing judgment, if the defendant has not appeared, appearance for him must be entered. *Hawkins v. Hassell*, 12 Mee. & W. 776; 1 D. & L. 1006.

[2] *Direction to Taxing-Masters*, H. T. 1853, r. 5.—"When judgment is signed on a cognovit, or on a judge's order, authorising the plaintiff to sign judgment, no declaration to ground judgment shall be necessary, or allowed on the taxation of costs." The costs, if to be taxed, must be taxed after the usual notice. *Booth v. Parker*, 3 Mee. & W. 54. *Wilson v. Northern*, 4 Dowl. 212. *Griffiths v. Liversedge*, 2 id. 143.

[3] Execution issues according to the terms of the cognovit. If the judgment is not final, a writ of inquiry must first be sued out. If the cognovit is to secure payment by instalments, unless it is stated to the contrary, judgment may be signed and execution issue on non-payment of each instalment. *Davis v. Gompertz*, 2 Dowl. 407; 2 Nev. & M. 607.

[4] The court will set aside the cognovit if procured by fraud (*Anon.* 1 Chit. R. 268), or given by an infant (*Oliver v. Woodroffe*, 4 Mee. & W. 650), or an insolvent by way of fraud on other creditors. *Tabram v. Freeman*, 2 Dowl. 375. *Collins v. Benton*, 9 Dowl. 905. So if the execution is issued against good faith, or not in pursuance of the cognovit, the court may set it aside, as in the case of a warrant of attorney. See *Joel v. Dicker*, 5 D. & L. 1. *Browne v. Burton*, 5 id. 298. If too much has been levied, the court may refer to the master to inquire into the real amount due. *Charrington v. Laing*, 3 M. & P. 587; 6 Bing. 242. *Wilson v. Price*, 4 Dowl. 213. *Evans v. Pugh*, 2 id. 360.

[5] See also *Robinson v. Nahon*, 1 Camp. 245. But if a kept mistress does not assume the name of the man, or pass as his wife, he will not be liable upon any contract that he has not expressly sanctioned. If, however, he has once allowed her to use his name, and represent herself as his wife, or, without the use of his name, has allowed her to pledge his credit, in order to rid himself of the liability thereby incurred, he must show that he gave some notice of the determination of the woman's agency. *Ryan v. Sams*, 12 Q. B. 460.

IV. Unlawful Possession of Filings or Clippings of Gold or Silver Coin, p. 135.

V. Buying or Selling Counterfeit Coin, p. 135.

VI. Importing or Exporting Counterfeit Coin, p. 136.

VII. Uttering Counterfeit Coin, p. 136.

VIII. Uttering, accompanied by Possession of other Counterfeit Coin, p. 137.

IX. Having Three or more Pieces of Counterfeit Coin with Intent, p. 137.

X. Second Offence after a previous Conviction is a Felony, p. 138.

XI. Counterfeiting Copper Coin, p. 139.

XII. Defacing Coin, p. 139.

XIII. Counterfeiting Foreign Coin, p. 139.

XIV. Making, Mending, or having Possession of Coining Tools, p. 140.

XV. Conveying Tools or Monies out of the Mint without Authority, p. 141.

XVI. Protection to Persons acting under the Act relating to Offences against the Coin, p. 141.

I. Counterfeiting the Gold or Silver Coin.[1]

Counterfeiting the gold or silver coin.

24 & 25 Vic. c. 99, s. 2. "Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin,[2] shall, in England and Ire-

[1] By the interpretation clause, s. 1, it is provided, that "in the interpretation of and for the purposes of this act, the expression 'the Queen's current gold or silver coin' shall include any gold or silver coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the Queen's copper coin' shall include any copper coin and any coin of bronze or mixed metal coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin,' shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination; and the expression 'the Queen's current coin' shall include any coin coined in any of her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of her Majesty's said dominions; and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include, not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."

[2] By the old law it was necessary that the counterfeit coin produced should bear that degree of resemblance to the real coin that it would be likely to be received as the coin for which it was intended to pass by persons using the caution customary in taking money. *Rex v. Varley*, 2 W. Black. 682; 1 East, P. C. 164. *Rex v. Harris*, 1 Leach, 165. But where the counterfeit coin was made to resemble the smooth-worn shillings then in circulation, without any impression whatever upon them, the case was holden to be within the statute. *R. v. Wilson*, 1 Leach, 285. *R. v. Welsh*, id. 293. It is not necessary to prove that the counterfeit coin was uttered, or attempted to be uttered. 1 Hale, 215; 3 Inst. 16; 1 East, P. C. 165; Arch. Cr. Pl. 610, 13th ed.

And by s. 30 of the 24 & 25 Vic. c. 99, "every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or put-

ting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

By s. 26 of the 24 & 25 Vic. c. 99, it is enacted, that "where any coin shall be tendered as the Queen's current gold or silver coin to any person who shall suspect the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, bend, or deface such coin, and if any coin so cut, broken bent, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, bending, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise whether the coin so cut, broken, bent, or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of her Majesty's Exchequer, and their deputies and clerks, and the receivers-general of every branch of her Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of her Majesty's revenue."

By s. 27, "if any person shall find or discover in any place whatever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold, silver, or copper coin, or any coin of any foreign prince, state, or country, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by diminishing or lightening any of the Queen's current gold or silver coin, it shall be lawful for the person so finding or discovering and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the Queen's current gold, silver, or copper coin, or any such foreign or other coin as in this act before mentioned, or has in his custody or possession any such false or counterfeit coin, or any instrument, tool or engine whatsoever adapted and intended for the making or counterfeiting of any such coin, or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, it shall be lawful for any justice of the peace, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and whensoever any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall in any case whatsoever be seized and carried before a justice of the peace, he shall, if necessary, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this act; and all such false and counterfeit coin, and all instruments, tools, and engines adapted and intended for the making or counterfeiting of coin, and all such machines, and all such filings, clippings, and bullion, and all such gold and silver in dust, solution, or otherwise as aforesaid, after they shall have been produced in evidence, or when they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of her Majesty's Mint, or to the solicitors of her Majesty's Treasury, or to any person authorised by them to receive the same."

By s. 31, "it shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law."

By s. 29, "where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

land,[1] be guilty of felony,[2] and in Scotland[3] of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."[4]

II. Colouring Counterfeit or Genuine Coin.

Colouring counterfeit coin or any pieces of metal

By 24 & 25 Vic. c. 99, s. 3, "whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever,[5] wash, case over, or colour any coin

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And by s. 32, "no conviction for any offence punishable on summary conviction under this act shall be quashed for want of form, or be removed by *certiorari* into her Majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a valid conviction to sustain the same."

[1] By s. 36, "all indictable offences mentioned in this act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas;' and where any of the crimes and offences, or high crimes and offences, mentioned in this act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland: provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces."

[2] By s. 35, "in the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

[3] By s. 34, "all high crimes and offences, and crimes and offences, against this act, which may be committed in Scotland, shall be proceeded against and tried according to the rules and procedure of the criminal law of Scotland; and all proceedings by this act made competent before any justice or justices, and all and every the powers and authorities by this act given to or conferred upon any such justice or justices, shall, in Scotland, be competent before and may be exercised by any sheriff, magistrate, or justice of the peace."

[4] By s. 39, "whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction."

By s. 40, "whenever solitary confinement may be awarded for any offence under this act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year."

As to the Costs of Prosecutions.—It is enacted by s. 42, "in all prosecutions for any offence against this act in England, which shall be conducted under the direction of the solicitors of her Majesty's Treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."

[5] Under the former acts a doubt was entertained whether a process by which the colouring was drawn to the surface was within the statute, and whether they did not apply only to colouring produced by superficial application. *R. v. Lacey*, 1 Leach, 153; 1 East, P. C. 166. The words, "by any means whatsoever," first introduced into the section in the text, exclude all questions of this character. *See* also *R. v. Case*, 1 Leach, 145; 1 East, P. C. 165. *Reg. v. Turner*, 2 Moo. C. C. 41.

whatsoever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over, or colour any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, case over, or colour any of the Queen's current copper coin, or file or in manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

with intent to make them pass for gold or silver coin.

Colouring or altering genuine coin with intent to make it pass for a higher coin.

III. Impairing the Gold or Silver Coin with Intent.

By 24 & 25 Vic. c. 99, s. 4, "whosoever shall impair, diminish, or lighten, any of the Queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Impairing the gold or silver coin with intent, &c.

IV. Unlawful Possession of Filings or Clippings of Gold or Silver Coin.

By 24 & 25 Vic. c. 99, s. 5, "whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Unlawful possession of filings or clippings of gold or silver coin.

V. Buying or Selling Counterfeit Coin.

By 24 & 25 Vic. c. 99, s. 6, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland,

Buying or selling, &c. counterfeit gold or silver coin for lower value than its denomination.

be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off."[1]

VI. Importing or Exporting Counterfeit Coin.

Importing counterfeit coin from beyond seas.

By 24 & 25 Vic. c. 99, s. 7, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland, of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Exporting counterfeit coin.

By sect. 8, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

VII. Uttering Counterfeit Coin.

Uttering coun-

By 24 & 25 Vic. c. 99, s. 9, "whosoever shall tender, utter, or put off[2] any

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[1] Under the former enactment, 2 Wm. 4, c. 34, s. 6, it was necessary to allege in the indictment, and prove by evidence, the sum for which the coin was bought, &c. *Rex v. Hedges*, 3 C. & P. 410. *Rex v. Joyce*, Carr. Supp. 184. The necessity of alleging the sum is now abolished by the above enactment, and the possibility of any variance in this respect is thus obviated. It will only be necessary to prove that the coin was bought at a rate lower than that which it imports.

[2] The giving of counterfeit coin to a woman as the price of connexion with her was holden to be within the statute *Reg. v. Page*, 8 C. & P. 122. But the giving of a piece of counterfeit coin in charity was held not to be an utterance within the statute, although the party knew it to be counterfeit, for there must be some intention to defraud. (Id.) But *quære?* see *Reg. v.* ——, 1 Cox, Cr. L. C. 250. It is uttering and putting off, as well as "tendering," if the counterfeit coin be offered in payment, though it be refused. *Reg. v. Welch*, 2 Dea. C. C. 78. See *Reg. v. Ion*, id. 475. *Reg. v. Radford*, 1 id. 59.

All persons engaged in the common purpose of uttering, although in pursuance of the common purpose the uttering be by one only of such persons in the absence of the others, yet they may be either jointly convicted, or either of such persons may be separately convicted of such offence of uttering, because there are no accessories in misdemeanors. *Reg. v. Greenwood*, 2 Deac. C. C. 453; S. C. 21 L. J. M. C. 127. See *Reg. v. Hurse*, 2 M. & Rob. 360, overruling *Reg. v. Else*, R. & R. 142. *Reg. v. Manners*, 7 C. & P. 801. *Reg. v. Page*, 1 Russ. 82.

If it be proved that the defendant, either on the same day or at other times, and whether before or after the uttering charged, uttered base money, either of the same or a different denomination, and whether to the same or a different person, or had about him other pieces of base money when he uttered the counterfeit money in question,

false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement." terfeit gold or silver coin.[1]

VIII. Uttering, accompanied by Possession of other Counterfeit Coin.

By 24 & 25 Vic. c. 99, s. 10, "whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Uttering, accompanied by possession of other counterfeit coin, or followed by a second uttering.[2]

IX. Having Three or more Pieces of Counterfeit Coin with Intent.

By 24 & 25 Vic. c. 99, s. 11, "whosoever shall have in his custody or possession[3] three or more pieces of false or counterfeit coin, resembling or apparently Having three or more pieces of counterfeit

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this will be evidence from which the jury will presume a guilty knowledge. *R. v. Whiley*, 2 Leach, 983. *Reg. v. Forster*, 1 Deac. C. C. 456. Or the fact that at the time of uttering the defendant knew the money to be counterfeit, may be proved by other circumstantial evidence.

By the sec. 28 of 24 & 25 Vic. c. 99, "where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction."

[1] By s. 13, "whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland, of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement."

[2] Where two persons went to a shop, and one of them went in and uttered a bad piece of money, having no more in his possession, and the other stayed outside the shop, having other counterfeit money, it was held that both might be convicted, the uttering and the possession being joint. *R. v. Skerrit*, 2 C. & P. 427. Wherever there is a joint uttering, and other counterfeit money is found on one of the persons so jointly engaged, and the other knew of such possession, both are guilty of the aggravated offence. *Reg. v. Gerrish*, 2 M. & R. 214. See *Reg. v. Rogers*, 2 Mood. C. C. 81. *Reg. v. Williams*, Car. & M. 259. *Reg. v. Hurse*, 2 M. & Rob. 360. *Reg. v. Greenwood*, 2 Deac. C. C. 453.

The double uttering must be charged in one count of the indictment. *R. v. Tandy*, 2 Leach, 835. See *R. v. Martin*, id. 923. *R. v. Robinson*, 1 Mood. C. C. 413.

[3] When pieces of counterfeit coin are

gold or silver coin in possession, &c. with intent, &c.

intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." [1]

X. Second Offence after a previous Conviction is a Felony.

Every second offence of uttering, &c. after a previous conviction shall be felony.

By 24 & 25 Vic. c. 99, s. 12, "whosoever, having been convicted, either before or after the passing of this act, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned,[2] shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

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found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under the section. *Reg. v. Rogers*, 2 Mood. C. C. 85. *Reg. v. Williams*, Car. & M. 259.

[1] By s. 38, "whenever any person shall be convicted of any indictable misdemeanor punishable under this act the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorised, fine the offender, and require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorised: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

[2] By s. 37, "where any person shall have been convicted of any offence against this act, or any former act relating to the coin, and shall afterwards be indicted for any offence against this act, committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having, or purporting to have, the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: Provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences,

XI. Counterfeiting Copper Coin.

Counterfeiting, &c. copper coin.[1]

By 24 & 25 Vic. c. 99, s. 14, "whosoever shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine, adapted and intended for the counterfeiting any of the Queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

XII. Defacing Coin.

Defacing the coin by stamping words thereon.[2]

By 24 & 25 Vic. c. 99, s. 16, "whosoever shall deface any of the Queen's current gold, silver or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour."

XIII. Counterfeiting Foreign Coin.

Counterfeiting foreign gold and silver coin.[3]

By 24 & 25 Vic. c. 99, s. 18, "whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign

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before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

[1] By s. 15, "whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement."

[2] By s. 17, "no tender of payment in money made in any gold, silver, or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced, shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: Provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent, in England or Ireland, of her Majesty's Attorney-General for England or Ireland respectively, or in Scotland of the Lord Advocate."

[3] By s. 19, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin resembling, or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."[1]

XIV. Making, Mending, or having Possession of Coining Tools.

Making, mending, or

By 24 & 25 Vic. c. 99, s. 24, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or

[1] By s. 20, "whosoever shall tender, utter, or put off any such false or counterfeit coin resembling, or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour."

And by s. 21, "whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By s. 22, "whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

By s. 23, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid."

By s. 41, "every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any act that may be passed for like purposes; and all provisions contained in the said acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this act: Provided that nothing in this act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the city of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence."

mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter-puncheon,[1] matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country,[2] or any part or parts of both or either of such sides;[3] or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession,[4] any edger, edging or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid;[5] or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." having possession of any coining tools, felony.

XV. Conveying Tools or Monies out of the Mint without Authority.

By 24 & 25 Vic. c. 99, s. 25, "whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly convey out of any of her Majesty's Mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement." Conveying tools or monies out of the Mint without authority, felony.

XVI. Persons acting under the Statute relating to Offences against the Crown are Protected.

By 24 & 25 Vic. c. 99, s. 33, "all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall, in England or Ireland, be laid and tried in the county where the fact was Venue in proceedings against per-

[1] *R. v. Lennard*, 1 Leach, 88; 1 East, P. C. 170.

[2] This was an indictable misdemeanor at common law. *Reg. v. Roberts*, 25 L. J. M. C. 17; 19 Jur. 1094.

[3] On an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the whole impression. *R. v. Foster*, 7 C. & P. 495. See *R. v. Sutton*, 2 Stra. 1074.

[4] See *Reg. v. Rogers*, 2 Mood. C. C. 85. *R. v. Foster*, 7 C. & P. 494.

[5] It is not necessary to prove the knowledge or intent of the defendant, for the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. *R. v. Ridgeley*, 1 East, P. C. 172.

Where a die-sinker employed to make a die for a shilling informed the Mint authorities, and under their direction made the die for the purpose of detecting the prisoner, it was held that the die-sinker was an innocent agent, and the defendant was rightly convicted as a principal. *Reg. v. Bannen*, 2 Mood. C. C. 309; 1 C. & Kir. 295.

sons acting under this act. Notice of action. General issue. Tender of amends, &c.

committed, and shall, in England, Ireland, or Scotland, be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant or defender one month at least before the commencement of the action; and in any such action brought in England or Ireland the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or defender; and if, in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in Scotland, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender has by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender unless the judge before whom the trial shall be shall certify his approbation of the action."

COLLATION. The conferring of a benefice by the bishop, where he has himself the right of patronage, and which act effects all that is done by presentations and institutions in other cases.

COLLIERY. *See* 18 & 19 Vic. c. 108, "To amend the Law for the Inspection of Coal Mines in Great Britain." *Reg. v. Brown*, 7 E. & B. 757.

COLLISIONS. *See* Carriers, *ante*, p. 29; *post*, Driving; Negligence; Shipping.

COLLUSION. *See* Judicial Dissolution of Marriage.

COLONIES. *See* Foreign Dominions of the Crown; Evidence; Witness.

COMMANDITE. *See post*, p. 153.

COMMENCEMENT of Action. *See* Statute of Limitations; Penal Actions.

Renewed Writ sufficient Evidence of.

Production of renewed writ is sufficient evidence of commencement of action.

15 & 16 Vic. c. 76, s. 13, "the production of a writ of summons purporting to be marked with the seal of the court, showing the same to have been renewed according to this act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action, or of the first date of such renewed writ, for all purposes."

COMMISSION-Day at Assizes. *See* Circuits, p. 118; Trial; Witness.

COMMISSION for Examining Witnesses. *See* Witness.

COMMISSION of the Peace.[1] *See* Justices.

[1] The form of the commission of the peace, as it exists at present, is said to have been settled by the judges in the thirty-third year of the reign of Queen Elizabeth. 2 Hawk. P. C. c. 8, s. 2. It assigns the several persons named in it, and every one of them jointly and severally, the Queen's justices, to keep the peace in a particular county, and to cause to be kept all statutes made for the good of the peace and the quiet government of the people, and to punish all who offend against the said statutes; and to cause to come before them all who shall threaten any of the people as to their persons, or the burning of their houses, in order to compel them to find surety for the peace or good behaviour, and if they shall refuse to find such surety to cause them to be safely kept in prison till they shall find it; also to inquire upon the oath of good and lawful men of the county of all felonies, trespasses, and offences, of which justices of the peace may lawfully inquire, &c. Dalt. J. P. ch. 5.

COMMISSION. *See* Principal and Agent; Work and Labour.

COMMISSIONS in the Army, Sale of.[1] *See* Army, vol. i. p. 514.

COMMISSIONERS of Bankruptcy. *See* vol. ii. p. 147.

COMMISSIONERS for taking Affidavits. *See* vol. i. p. 240.

COMMITMENT. The order or warrant by which a justice of the peace commits a person to prison.[2]

COMMITTING Offences, Apprehension of Persons for. *See* Constable, *post*, p. 182; Felony; Imprisonment; Justice of the Peace; Larceny; Malicious Injuries, &c.

COMMITTITUR. Committitur-piece.[3]

COMMODATUM. A gratuitous loan. *See* Bailment, vol. ii. p. 108.

COMMON, Rights of.[4]

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(B) „ *Appendant*, p. 144.

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[1] By the 5 & 6 Edw. 6, c. 16, ss. 2, 3, and 49 Geo. 3, c. 126, all contracts for money or profit relating to *inter alia* any commission, civil, naval, or military, shall be void. But by s. 7 it is provided that the statute shall not extend to any purchase or sale, or agreement for the purchase or sale, of commissions in the army at the regulated prices, authorised regimental agents acting without fee. *See ante*, vol. i. p. 517.

[2] Warrants of commitment should strictly pursue the conviction upon which they are founded. *Wicks v. Clutterbuck*, 2 Bing. 483. A commitment in execution need not recite the title of the statute on which the proceeding is founded. *R. v. Harper*, 1 D. & R. 222. Although the act upon which the commitment proceeds expressly takes away a *certiorari*, so as to prevent the superior courts directly removing the supposed conviction in order to ascertain whether or not there has been a sufficient conviction to support the commitment; yet the court, in which the question respecting the validity of the commitment is under discussion, may ascertain the contents of the conviction by examining a verified copy. *R. v. Mellor*, 2 Dowl. 173.

After a prisoner has been committed on an informal or defective warrant of commitment, if a correct and formal warrant is afterwards delivered to the gaoler in substitution of such defective warrant, the prisoner may lawfully be detained under the second warrant. *In re Cross*, 1 H. & N. 651; 26 L. J. Ex. 184. *Reg. v. Richards*, 5 Q. B. 926. *See* further, Justice of the Peace; Sessions.

[3] An order or minute setting forth that the person named in it is committed to the custody of the sheriff; most commonly used on the surrender of a defendant by his bail, in which cases it is a minute of the render and commitment. 1 Tidd's Pr. 285; 13 East, 47.

[4] *See* Cooke on Commons and Enclosures; Woolrych on Commons.

(D) *Replication*, p. 150.
(E) *Evidence*, p. 151.
(F) *Questions for the Jury*, p. 152.
(G) *Verdict*, p. 152.

I. What they are.[1]

(A) *Common in Gross.*[2]

(B) „ *Appendant.*[3]

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[1] Rights of common are incorporeal hereditaments, being merely rights to take part of the produce of another's land or water therein — such as to feed cattle, to dig turf, to cut wood, to catch fish, or the like. They are principally these: — *Common of Pasture*,—that is, a right or liberty that one or more have to feed their beasts on another man's land. 2dly. *Common of Turbary*,—that is, the liberty to cut turves in another's soil to be burnt in a house. *See* Noy. 145; 7 East, 121; 3 Lev. 165. 3dly. *Common of Piscary*,—a right to take fish in another's pond, pool, or river. 4thly. *Common of Estovers*,—a right to take trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. *See* Cro. Jac. 25; 5 Rep. 25, a; 4 id. 87, a; Cro. Eliz. 820; Plowd. 381. 5thly. A liberty which, in some manors, the tenants have of digging and taking sand, gravel, stone, &c., in the lord's soil. Bac. Abr. Common, A. Claims of common must be made with some restriction or limitation. *Clayton v. Corby*, 5 Q. B. 419.

There may be a prescription to take the sole and several herbage for a limited time in every year, in exclusion of the owner of the soil. *Welcome v. Upcon*, 6 Mee. & W. 536. *Potter v. North*, 1 Vent. 385. *North v. Cox*, 1 Lev. 253. *Rex v. Whixley*, 1 T. R. 137. A like prescription, in exclusion of the owner of the soil for the whole year, was held to be good, as it did not exclude the lord from his profits of mines, trees, and quarries. 2 Saund. 324; 2 Lev.; 2 Polexf. 13; 1 Mod. 74. A tenant may prescribe to have all the thorns growing in such a place, to the exclusion of the owner of the soil. *Dowglas v. Kendal*, Cro. Jac. 256. But a man cannot prescribe to have a common *eo nomine* for the whole year, in exclusion of the lord, for this is repugnant to the nature of the thing. 1 Vent. 395; Co. Litt. 122 a; 1 Roll. Abr. 396 A. pl. 12; 2 id. 267, pl. 2; 2 Lev. 268. But the lord may be restrained by custom to a qualified right of common during a part of the year. Yelv. 129; 1 Brownl. 187; Cro. Jac. 208. And it has been said that the lord may be restrained, together with the commoners, from using a common at all during a part of the year. 1 Roll. Abr. 405. And the commoners may prescribe to have common in exclusion of the lord for a certain period. 2 Roll. Abr. 267, L. p. 1.; 1 Wms. Saund. 253, n. 2. So a man may prescribe to have a separate fishery, to the exclusion of the owner of the soil wholly from fishing, for he has still the profit of the soil and water. Co. Litt. 122 a; Vent. 391.

Common of pasture cannot be claimed in respect of a house alone without land (5 T. R. 46), but it may in respect of land to which there is no house attached. 2 B. & A. 260.

[2] Common in gross is a right to turn on for pasture a certain limited number of cattle, and which may have been made, and still may be, by grant under seal, without regard to tenure or to any land of the grantee, and is merely to the grantee and his heirs at large, without qualification, and belongs to his person, and is, therefore, termed "in gross." It may be claimed by prescriptive right, which supposes an original grant by deed, as by a parson of a church or a sole corporation. 1 Chit. G. P. 213. It is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor (2 Bl. Com. 34), and it is never parcel of a manor. Willes, 323; 4 Co. 38 a. It follows that levancy and couchancy are not essential in the exercise of this right. 5 Taunt. 244; 1 Roll. Abr. 401, pl. 3; Cro. Jac. 27; 1 Lord Raym. 726.

It is not necessary in pleading to allege in express terms whether the common of pasture be appendant, appurtenant, or in gross.

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre*. *Mellor v. Spateman*, 1 Saund. 343. *Clarkson v. Woodhouse*, 5 T. R. 412, n. Where, before the passing of 5 & 6 Wm. 4, c. 76, all freemen inhabiting within an ancient borough claimed right of common in certain lands, and the borough was extended by s. 7 of that act, the right is reserved only to the freemen within the old limits. *Beadsworth v. Torkington*, 1 Q. B. 782. *See* a plea of common by a burgess under a grant to a corporation, *Parry v. Thomas*, 5 Ex. 37. *See* Grant, 346, n.

A right of common in gross does not confer a vote for the coroner of a county. *Reg. v. Day*, 3 E. & B. 859.

[3] Common appendant properly is a right attached to arable land, and is an incident of tenure, and supposed to have originated in the lord or owner of a manor or waste originally, in consideration of certain rents or services, or other value, granting out to a freeholder, or to a copyholder, plough land

(C) *Common Appurtenant.*[1]

(D) Pur Cause de Vicinage.[2]

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or land to plough, and at the same time granting sometimes expressly, but generally impliedly, and as of common right and necessity, common appendant over his remaining wastes and commons, so that such grantee might, whilst his corn was growing, have a place to turn out his horses and beasts kept to plough such land, and sheep and other cattle kept to manure the same. Co. Litt. 122 a. *Per Willes, C. J.*, in *Bennett v. Reeve*, Willes, 227. Levancy and couchancy are incident to common appendant as common appurtenant; that is to say, the owner of the arable land can turn on no more cattle than would be proper to till and manure his quantity of arable land, nor more than the produce of the land would support in the winter, and consequently the number as well as kind of cattle must be limited with relation to the quantity and nature of the land. 4 Vin. Abr. 583, pl. 6; Willes, 222; 2 Bl. Com. 32. It cannot be for cattle borrowed, unless they be used all the year to plough or manure the soil. (Id.) This right of common is apportionable or severable: if the land be divided ever so often, every little parcel of land is entitled to common appendant. It may be claimed even for a yard, because the aggregate number of cattle that may be legally turned on would not, by such subdivision, be increased. 4 Co. 37; 8 id. 79, a; Willes, 222; 2 B. & Ad. 168.

[1] The right to common appurtenant originated in a grant by deed, which might be made by any person who had waste or other land to another person, owner of the land, to have his cattle, or a particular description of cattle, levant and couchant upon his land, upon such waste or other land, at certain seasons of the year, or at all times of the year; and uninterrupted usage for upwards of twenty years, during a tenancy in fee of the owner of the waste, will afford sufficient evidence of a corresponding right. Such an express grant may be made at this day. 1 Chit. Gen. Pr. 212; 15 East, 116. It differs, therefore, from common appendant in respect of its not being necessarily connected with tenure, nor confined to arable land, nor to beasts of the plough, or for manuring land; and it may extend to animals not generally commonable, as hogs, goats, or the like. 1 Chit. Gen. Pr. 212.

The intendment is that no person would make a grant of common appurtenant without limit as to the number of cattle, and that he would grant it only for such number as would be essential or useful for the fair occupation of the grantee's land, and consequently only for so many of his own cattle as the produce of that land in the summer and autumn can keep and maintain in the winter, which is the meaning of the term levant and couchant. Until the quantity of cattle has been fixed by a jury the precise number is uncertain, as more produce may be raised in one year than in another; and which is the reason this is sometimes, though inaccurately, termed *sans nombre*: but it is still certain in its nature, and readily to be ascertained with reference to the quantity and quality of the land, and the usual produce and number of cattle ordinarily kept upon the same during the last twenty years. 2 Brownl. 101; 1 Vent. 54; 5 T. R. 48; 1 B. & A. 706.

In a plea prescribing for common of pasture appurtenant to land, it is essential to aver that the cattle were the party's own cattle, levant and couchant on his land; and if the claim be for an unlimited number without these qualifying words, it cannot be supported. Willes, 232; 8 T. R. 396; 1 Saund. 28; 2 Sand. 346, n. 1.

[2] This is not a right of common, but merely an excuse for a trespass when two commons are near each other, and the cattle of the commoners have been accustomed to wander on each, in consequence of there being no division-fence between them. It would not justify one commoner turning or driving his cattle on to the common upon which he has no strict right of pasture, and the owner of the soil might legally fence one common from the other, and thereby put an end to this mere excuse for the trespass. *Musgrove v. Cave*, Willes. 319; Co. Litt. 122; 13 East, 348; 2 Wils. 269; 2 Wooddes, 78; 4 Co. 38; 2 Mod. 105.

It is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying into the other's fields, without any molestation from either. This is only a permissory right, intended to excuse what in strictness is a trespass in both, and therefore either township may enclose and bar out the other, though they may have intercommoned time out of mind. *Wells v. Pearcy*, 1 Bing. N. C. 556; 1 Scott, 426. *Gullett v. Lopes*, 13 East, 348. All that it is necessary for the pleading to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years user under the statute, 2 & 3 Wm. 4, c. 71. *Pritchard v. Powell*, 10 Q. B. 589. But common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. *Heath v. Elliott*, 4 Bing. N. C. 388; 6 Scott, 172.

It seems that common *pur cause de vicinage* may exist between two neighbouring proprietors, though there be no other right of common over the land on either side from which the cattle escape. But a plea claiming common *pur cause de vicinage* in respect of a private estate, over

II. Prescription for.[1]

Enjoyment for thirty years gives a prescriptive right.

By 2 & 3 Wm. 4, c. 71,[2] "whereas the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken and enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed, &c. as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

III. An Encroachment on the Waste by the Tenant is prima facie an Addition to the Holding.[3]

which no other right of common is shown, and alleging such common to exist by custom, is bad, and a plea of such common against the owner of the land into which the cattle escape must be pleaded by way of grant or prescription. Accordingly, where the defendant alleged, in justification of a trespass, that the land of A. and the land of B. were from time whereof, &c. had been contiguous to each other, and not separated by any fence, and that the sheep from time to time duly put on the land of A. to feed from time immemorial have gone, escaped, &c., and have been used and accustomed to go, &c. therefrom into the land of B., and to intermix there, and to feed with sheep from time to time feeding on B.'s land, and in like manner &c., alleging that the sheep on B.'s land were used to go on A.'s, the court held that it was ill pleaded. *Jones v. Robin*, 10 Q. B. 581; in error, id. 620.

The lord, it has been said, may dig claypits on the common without leaving sufficient herbage, if it can be proved that such right has been immemorially exercised (*Bateson v. Green*, 5 T. R. 411); but, as pointed out by *Lord Denman*, *C. J.* (5 Q. B. 730), if this decision imports that a lord, after granting rights of common, may help himself to any part of the common land, to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported on principle. See *Folkard v. Hemmett*, 5 T. R. 417.

A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly every fortnight), and to place posts and tables there a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, each paying therefore to the lord a compensation of 2*d.*, is good. *Tyson v. Smith*, 9 Ad. & E. 406; 1 Per. & D. 307.

Where an inclosure act directed that the commissioners should set out and allot a certain portion of the common lands for the getting of stone, gravel, and other materials for the repair of the highways and other roads to be set out under the act, and for the use of the inhabitants within the parish, it was held that the inhabitants were not thereby authorised to take such materials for their private purposes, but only for the repair of the roads. *Rylatt v. Marfleet*, 14 Mee. & W. 233.

[1] The proof of the right lies on the party claiming it, and evidence of enjoyment for twenty-nine years will not satisfy the former part of the above clause. *Bailey v. Appleyard*, 8 Ad. & E. 161. But a mere intermission of the user will not amount to an interruption sufficient to defeat a claimant. *Carr v. Foster*, 3 Q. B. 581.

[2] For the cases upon the construction of these statutes *see post*, Easement; Prescription.

[3] Encroachments made by a tenant are

KINGSMILL v. MILLARD, 11 Ex. 318.

Per Parke, B. "It is laid down in all the cases, whether the inclosed land is part of the waste or belongs to the landlord or a third person, that the presumption is that the tenant has inclosed it for the benefit of his landlord, and unless he has done some act disclaiming his landlord's title I am disposed to discard the definition that the encroachment is made for the benefit of the landlord, and to adopt that of *Lord Campbell*, namely, that the encroachment be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land enclosed should be adjacent to the demised premises; the same rule prevails when the encroachment is at a distance. That is now the law, and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm: for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding. But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding."

An encroachment on the waste by the tenant is *primâ facie* an addition to the holding.

IV. INCLOSURE OF.

(A) *Where a Common is Allotted among the Commoners, who are to Inclose, one who does not Inclose cannot distrain Cattle trespassing on the Common.*

WELLS v. PEARCY, 1 Bing. N. S. 556; 1 Scott, 426.

Declaration in replevin for taking the plaintiff's cattle upon Bepton Common, the defendant avowed for damage-feasant, stating in his avowry that he (the defendant), before and at the time of passing the Inclosure Act, was entitled, as occupier of a certain cottage and land in Bepton, to a prescriptive right of common of pasture over the *locus in quo*. The avowry then proceeded to set

Where a common is allotted among the commoners, who are to inclose,[1] one who does not inclose cannot distrain cattle trespassing on the common.

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for the benefit of the landlord, unless it appears clearly by some act done at the time of the making of the encroachments that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent. *Doe d. Lewis v. Rees*, 6 C. & P. 610; *see* 2 E. & B. 353. Where a lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near to, but not actually contiguous to the farm, it was held that, in the absence of evidence showing a contrary intention, it was to be presumed that the lessee made the inclosure for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease. *Doe d. Lloyd v. Jones*, 15 Mee. & W. 380.

So where the tenant encroached on a waste not belonging to his landlord, and separated from his holding by a road, built on the encroachment, and occupied it as part of his holding, and ancillary to the occupation thereof for more than twenty years: he then gave up the original holding to his landlord, but claimed to hold the encroachment as his own: the landlord brought ejectment, and the court held that the encroachment made under such circumstances is as between landlord and tenant to be presumed to be part of the holding, that it rested on the defendant to show by other facts that the encroachment was not made as part of the holding, and that the mere intervention of the road did not rebut the *primâ facie* presumption. *Andrews v. Hailes*, 2 E. & B. 349. This presumption, however, prevails only in favour of the landlord as against the tenant, and not as against the rights of a third party. *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

[1] Freehold tenants of a lordship, having rights of common for their cattle levant and couchant, and common of turbary and estovers, the lord approved parts of the common, and granted them to other persons; the tenants protested; upon which actions of trespass were brought against them, and they filed a bill in the nature of a bill of peace against the lord and his grantees, to be quieted in the enjoyment of their commonable rights. A general demurrer was overruled, the court considering it no objection to the bill that each defendant had a right to make a separate defence, provided that right was a general one, and the court could not, before answer, judge of the nature of the right. *Powell v. Earl Powis*, 1 Y. & J. 159.

forth some of the provisions of the 3 Wm. 4, for inclosing lands in the parish of Bepton, from which it appeared that the commissioner appointed by the act had authority before the execution of his award, by notice in writing under his hand, to direct "that all the rights of common in, over, or upon the said common called Bepton Common, should become extinguished; and that if, after such notice, any of the claimants of pasturage or common rights, or any other person or persons whatsoever, should permit their cattle or sheep to feed or depasture on any of the land on which such rights of common were so extinguished, it should be lawful for any other proprietor or occupier to distrain them in the manner pointed out in the act." The avowry then proceeded to state, that the commissioners did on a certain day give notice under the act, that all the rights of common in, over, or upon the said common called Bepton Common, should be for ever thereafter extinguished, whereby the same were extinguished accordingly; and that, because the plaintiff, after such rights of common were extinguished, permitted his cattle to feed on Bepton Common, the defendant, as occupier of the said cottage and land, distrained them under the power so given by the statute. To this avowry the plaintiff pleaded in bar, that the said place in which, &c., hath always been contiguous and next adjoining to a certain other common, called Woolbedding Common, and had never been separated therefrom by any fence sufficient to prevent cattle feeding on Woolbedding Common from erring and escaping into the close in which, &c. On general demurrer,—

Per Cur. "We are of opinion, that a private act of parliament for the inclosure of a common, and an award by the commissioners under that act, that all rights of common shall be extinguished, does not render the cattle damage-feasant of commoners *pur cause de vicinage* liable to be distrained, unless the *locus in quo* has been completely fenced, or such commoners have had express notice of the extinguishment."

V. Relative to Actions connected with Commons.

(A) *Who may Sue.*[1]

(B) *Case for Disburbance of Common.*[2]

(C) *Pleas.*[3]

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[1] Overseers who inclose common lands for the use of the poor, may maintain trespass, though the inclosure was without the (*Mayson v. Cook*, 4 Bing. N. S. 372) consent of the lord, according to 1 & 2 Wm. 4, c. 42, s. 2.

[2] In case for disturbance of common "for all plaintiff's cattle levant and couchant," which he supported by a lease of premises, "with reasonable common of pasture," and the defendant afterwards showed a conveyance in fee to the plaintiff of the same premises, "with all common, &c. thereunto belonging, or in anywise appertaining;" the court held that the latter constituted only a grant *de novo* of the former easement, and did not disprove the declaration. *Dordge v. Carpenter*, 6 M. & S. 47.

Declaration for Disturbance of Plaintiff's Right of Common by digging Turf, &c.

That the plaintiff was possessed of a messuage and land, and by reason thereof was entitled to have common of pasture for all his commonable cattle levant and couchant in and upon his said messuage and land, over a waste or common called
situate at at all times of the year as to the said messuage and land appertaining, and the defendant on divers days and times disturbed in the use and enjoyment of his said common of pasture by wrongfully digging up and subverting the soil, and carrying away the turf of the said waste, and by enclosing and separating part of the said waste from the residue thereof; and so continuing the same for a long time, whereby the plaintiff was prevented from having the use and enjoyment of his said common of pasture in so ample and beneficial a manner as he otherwise might have had. *See* B. & L. Precedents, 171; and *Ricketts v. Salway*, 2 B. & A. 360. *Carr v. Foster*, 3 Q. B. 581. *Bowen v. Jenkin*, 6 Ad. & E. 911. *Cheesman v. Hardham*, 1 B. & A. 706. *Beadsworth v. Torkington*, 1 Q. B. 782. *Pinder v. Wadsworth*, 2 East, 154.

[3] The following form of *Plea of Right of Common of Pasture* is prescribed by 15 & 16 Vic. c. 76, sched. B. 47:

That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof for thirty (or sixty) years before this suit enjoyed as of right and without interruption common of pasture over the said land of the plaintiff,

PEARCE v. LODGE, 12 Moore, 50.

Trespass for taking furze.

In trespass, for taking and carrying away furze, the defendant pleaded the general issue.

Under the plea of not guilty, the defendant may show an exclusive right of possession.[1]

The court held, that persons who had a right of common were competent witnesses for him, to prove that he was entitled to the exclusive possession of the land from which the furze was taken. *Sed vide Heath v. Milward*, 2 Bing. 429 ; 2 Scott, 160 ; 7 C. & P. 501 ; 5 Ad. & E. 221.

JONES v. PRICE, 3 Bing. N. S. 52 ; S. C. 3 Scott, 376.

Plea of enjoyment of common for thirty years "before the commencement of the suit" is sufficient, without the word "next."[2]

To an action of trespass, the defendant pleaded enjoyment of common right for thirty years before the commencement of the suit.

The court held the plea sufficient, although it did not allege, "next before," &c., the 2 & 3 Wm. 4, c. 71, s. 4, being nothing more than an exposition of proof requisite to support the right.

ARLETT v. ELLIS, 9 B. & C. 671.

To trespass for entering plaintiff's close and destroying hedges, &c., the defendant may plead a right of common by custom.

In trespass, for breaking defendant's close, destroying hedges, &c., pleas, *inter alia*, claiming a right of common of pasture, by a custom within the manor, that every customary tenant of an ancient customary tenement of a messuage and land, whereof the defendant was seised, should have common of pasture, upon which issue was taken ; a like issue was taken upon a custom stated in another

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for all their cattle levant and couchant upon the said land of the defendant at all times of the year as to the said land of the defendant appertaining, and that the alleged trespass was a use by the defendant of the said right of common.

Plea justifying driving the plaintiff's sheep, because they were trespassing where the defendant had a right of common, *Papendick v. Bridgwater*, 5 E. & B. 166. Pulling down obstruction to defendant's common, *Perry v. Fitzhowe*, 8 Q. B. 757. *Davies v. Williams*, 20 L. J. Q. B. 330. For forms of plea justifying under a right of sole pasturage in gross, see *Welcome v. Upton*, 5 Mee. & W. 398 ; 6 id. 536. *Pur cause de vicinage*, *Jones v. Robin*, 10 Q. B. 581. *Prichard v. Powell*, id. 589. *Heath v. Elliott*, 4 Bing. N. C. 388. By a copyhold levant of a right of turbary within the manor, *Grant v. Gunne*, 1 Taunt. 435. To dig minerals, *Paddorck v. Forrester*, 3 Man. & G. 903. To dig coals, *Anglesey v. Hatherton*, 10 Mee. & W. 218. *Wilkinson v. Proud*, 11 id. 33. Clay for bricks, *Clayton v. Corby*, 2 Q. B. 813. To take sand and marl, *Glover v. Dixon*, 9 Ex. 158. *Blewett v. Tregonning*, 3 Ad. & E. 554. *See* B. & L. Pl. 425.

To an action for a disturbance of the plaintiff's right of common the defendant justified that he was entitled to a right of common appurtenant on the *locus in quo* "for one cow, and three-fourth parts of right of common for one other cow," and that one L. had "one-fourth part of a right of common of pasture for one cow," and that the defendant in his own right, and as the servant of L. put two cows in the *locus in quo*. The court held that the plea was bad, the fourth part of a right of common being unintelligible : but *quære* whether, if the right alleged had been a right of pasture for the fraction of a cow, &c., it would have been a good plea. *Nicholls v. Chapman*, 29 L. J. Ex. 461.

[1] If a commoner, who consents to an encroachment by another commoner, brings an action, the latter may plead leave and license. *Harvey v. Reynolds*, 1 C. & P. 141. Where, in trespass, upon a plea of leave and license, it appeared that the plaintiff (when under age) had suffered the defendant to erect buildings on the common without objection, and had afterwards, when of full age, upon discovering an additional encroachment, required an increase of rent, or annual acknowledgment :—*Held*, that the plea was supported. *Harvey v. Reynolds*, 12 Price, 721.

In an action for disturbance of the plaintiff's right of common, the plea of the general issue will only operate as a denial of the act of disturbance alleged to have been committed by the defendant. It is therefore necessary that there should be distinct pleas, traversing the alleged possession of the tenement in respect of which the plaintiff claims, and also the right claimed if these allegations are denied.

[2] A prescriptive right may still be pleaded in the old form as annexed to the estate in fee, and as existing from time immemorial, but it must then be supported by the evidence as such immemorial right, and cannot be aided by the statute. A prescriptive right subsisting by force of the statute must be pleaded according to the fact. *Welcome v. Upton*, 5 Mee. & W. 398 ; and see *Holford v. Hankinson*, 5 Q. B. 587.

plea, as to a right of turbary. It appeared that the defendant, being such customary tenant of such premises as in the plea stated, in 1812 built a new dwelling-house on part of the premises, which he afterwards occupied, the old house remaining unoccupied until 1825, when, having fallen into great decay, it was pulled down ; and that during the interval, whilst the tenant occupied the old, and afterwards when he occupied the new house, he continued to exercise the same customary rights.

The court held, that the defendant was entitled to have the issue joined upon the right of common of pasture found for him in respect of an ancient customary tenement:—*Held*, also, that, to a new assignment alleging the breaking down more of the fences than was necessary for the convenient ingress and egress of men and commonable cattle, and plea of not guilty thereto, it appearing that the defendant did so, really intending to assert and preserve the rights of common, although not about to exercise them, he was also entitled to have the issue upon the plea of not guilty to the new assignment found for him.

Elliott v. Hardy, 3 Bing. 61.

To an avowry claiming a right of common by a free burgess under a corporate grant, a plea, "that the corporation had been accustomed to appoint a reasonable and proper number of herds," is good after verdict.

In an action of replevin for taking the plaintiff's cattle, the defendant avowed, under a grant of common of pasture from D. V. to the burgesses of a borough, for each of the burgesses inhabiting therein ; and the plaintiff pleaded in bar that the corporation had a prescriptive right to appoint a reasonable number of herds for taking care of the cattle put on the common, and a like right of appointing, as a remuneration to each herd, a reasonable number of stints of each such herd to be depastured on such common, and then prescribed for common of pasture of such stints. After verdict, it was objected that the number of herds or stints ought to have been set out with certainty on the face of the plea, and that the custom was invalid, and could not be supported by such a grant.

Per Cur. "The first question is, whether the right of the herds has been alleged with sufficient certainty in the plaintiff's plea in bar. It is unnecessary to decide that point as if it had come before us on special demurrer, as the objection was not raised till after verdict. The issues might have been taken on the prescription ; and although the question was not raised for the jury to determine what was a reasonable number of herds or stints, yet it has not been admitted, on the face of the pleadings, as if it had been submitted to them ; and it appears to us that it has been set out with sufficient certainty. The reasonableness of the number of herds must depend on the number of cattle the common can bear in any one year ; and the grant to the corporation was, that they should appoint a reasonable number of herds and stints to be depastured on the common, for the care or trouble of such herds in guarding the cattle so depastured. It appears, therefore, as far as regards the first question, that the allegation as to the right of the herds has been alleged with sufficient certainty ; but the second pleading question is, whether the custom itself is a valid custom: we think it is not."

(D) *Replication.*[1]

Rogers v. Wynne, 7 D. & R. 521.

Replication, that the common was inclosed with consent of the owner in fee, must show sufficient common was left.

Trespass, for breaking and entering the plaintiff's close, and, with sheep, spoiling and consuming the herbage. The defendants justified under a right of common for sheep, the *locus in quo* being part of the common. *Replication.* That the *locus in quo* had been inclosed, divided, and separated from the residue of the common, with the approbation of the owner in fee. *Special demurrer.* That

[1] For form of replication of approvement of common see *Lake v. Plaxton*, 10 Ex. 196; B. & L. Precedents, 171.

the replication did not state that sufficient common was left after the inclosure.

Per Cur. "The insufficiency of common left is to be presumed by the plea; that states that the inclosure, no matter by whom, prevented the full enjoyment of the common. If the plaintiff rely upon the inclosure, it is for him to state that enough was left after the inclosure. The cases in Willes, and in the Institutes, are clearly in point." *Greenhaw v. Isley and others*, 1 Willes, 619; and 2d Institute, 88.

BOWEN v. JENKINS, 2 Nev. & P. 87; 6 Ad. & E. 911.

A surcharge must be newly assigned.

In case, for disturbing plaintiff's right of common. *Plea*, justifying as for defendant's own commonable cattle. *Replication*. That all were not the defendant's cattle levant and couchant.

The court held that, the action being in substance for surcharging, it ought to have been newly assigned, and that the judge properly rejected evidence respecting it.

(E) *Evidence.*[1]

WELCOME v. UPTON, 7 Dowl. P. C. 475; 5 Mee. & W. 398; 6 id. 536.

A plea of immemorial right of common, commencing before time of legal memory, is not supported by proof of a grant in 1755.

Trespass. The defendant, in his first plea, justified under a demise from Billingsley, the lord of a manor, and claimed the sole and several pasturage in the *locus in quo*, as appurtenant to the manor. The second plea was as follows: —"That before and at the said several days and times when, &c., in the declaration mentioned, Billingsley, and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and have been used and accustomed to have, and of right ought to have had, and the said Billingsley still of right ought to have, for himself and themselves, the sole and several herbage and pasturage of, and in divers, to wit, 217 a., 2 r., and 3 p. of the said open field, called Port and Girlton Field, in the said declaration mentioned, in gross, for all manner of his and their cattle to feed and depasture thereon, from the 4th of September in each and every year respectively; and that before the said several days and times when, &c., to wit, on the 1st of March, 1836, the said Billingsley demised to him, the defendant, a certain other messuage, land, and premises, with the appurtenances, situate and being in the parish of Oving aforesaid, in the county aforesaid, to hold the same to him, defendant, as tenant thereof to the said Billingsley, thenceforth from year to year, for so long a time as they should respectively please." At the trial, the defendant gave in evidence a conveyance of the right of pasturage, dated 1755, from one Brereton to Samuel Billingsley, an ancestor of Billingsley in the plea mentioned, and also several mesne conveyances, proving Mr. Billingsley's title. Several leases were also produced, under which the different parties had let the pasturage; and the rents received for the same were shown by the steward's accounts. It was objected, on the part of the plaintiff, that there was no proof of the ancestorial right to be enjoyed by Mr. Billingsley and his ancestors for his and their cattle to feed and depasture thereon; and that such personal right could not be assigned, but must be used by Mr. Billingsley alone.

Per Cur. Whether or no this was a claim to a profit *à prendre*, and even admitting that sect. 5 of the Prescription Act did not include such a profit, when neither appendant nor appurtenant, yet the evidence disproved the immemorial right as pleaded; and sect. 1 of that statute did not cure the variance. The proper course, in such cases, would be to plead the enjoyment of the right for the period therein mentioned, as might be applicable to the case.

[1] If issue be taken on the plea of right of common, the defendant must establish it. *Maxwell v. Martin*, 6 Bing. 522; 4 M. & P. 491.

TAPLEY v. WAINWRIGHT, 2 Nev. & M. 697; 5 B. & Adol. 395.

Trespass. *Plea*, right of common. *Replication*, that the close had been inclosed: — *Held*, that proving that the part trespassed on had been inclosed was sufficient.

Declaration for trespasses in Whiteacre. *Plea.* That Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. *Replication.* That Whiteacre had been enclosed and severed from the waste, and held adversely to the commoners for twenty years. It appeared that the alleged acts of trespass had been committed over the whole surface of a close, by destroying the crops growing thereon. Of this close, nine-tenths had been inclosed from the commons, and held adversely as against the commoners for more than twenty years. The residue had been inclosed for a shorter period. A verdict was found for the plaintiff.

Per Cur. "The question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not. Therefore it is clear that, upon the issue in this case, the plaintiff need not have proved that more than the parts actually trespassed upon (and which the defendant must be understood to have known when he pleaded to them), were inclosed twenty years."

(F) *Questions for the Jury.*

ARLETT v. ELLIS, 7 B. & C. 346.

The extent of the right to approve is a question for the jury;

Trespass. Plea, that the plaintiff's close was parcel of a manor; and that the defendant was seised of a customary tenement of the said manor; and that he was entitled by custom, in right of such tenement, to common of pasture upon the plaintiff's close; and issue taken upon such custom. The plaintiff also new assigned. The defendant entered for other purposes.

The court held, that upon the first issue the plaintiff might show a custom for the lord to inclose parcels of the waste, and that his close had been inclosed by the lord, and granted to him, as showing that the right of common no longer existed, without pleading the latter custom specially; but as such right to approve depended upon the question of a sufficiency having been left at the time for all the persons having right of common, that question ought to have been submitted to the jury; and that not having been done, a new trial was granted.

MANIFOLD v. PENNINGTON, 4 B. & C. 161.

and also whether the right of common claimed be proved.

Declaration stated that the plaintiff was possessed of a messuage and 200 acres of land, with the appurtenances, in the parish of Budworth, in the county of Chester; and by reason thereof was entitled to common of pasture for all his commonable cattle, levant or couchant; and that the defendant disturbed him in the exercise of this right by turning on cattle. The plaintiff proved that he was a freeholder in the parish of Budworth, and had been always accustomed to turn on to the common mentioned all the commonable cattle he had — viz. horses, cows, and calves, but that he never kept any sheep; but that other freeholders in Budworth who had sheep put them on the common. The learned judges thought that this evidence did not establish the right as laid, and nonsuited the plaintiff.

Per Cur. Ballard v. Dyson (1 Taunt. Rep. 279), shows that it was for the jury to consider whether the extent of the right of common claimed was made out by the user proved. There must be a new trial.

(G) *Verdict.*

TAPLEY v. WAINWRIGHT, 2 Nev. & M. 697; 5 B. & Adol. 395.

In trespass, on a question of right of common, the

Declaration for trespasses in Whiteacre. *Plea.* That Whiteacre is part of a waste called Dale, over which the defendant had common appurtenant by prescription. *Replication.* That Whiteacre had been inclosed and severed from the

waste, and held adversely to the commoners for twenty years. It appeared that the alleged acts of trespass had been committed over the whole surface of a close, by destroying the crops growing thereon. Of this close nine-tenths had been inclosed from the common, and held adversely as against the commoners for more than twenty years: the residue had been inclosed for shorter period. A verdict was found for the plaintiff.

verdict may be for the plaintiff as to part of the close, and for the defendant as to part.

Per Cur. "The question on these pleadings is, whether, in order to maintain this issue, the plaintiff must prove that every part of the close had been separated and divided for that time. We are of opinion that he need not. No doubt that the parties will agree to apportion the damage found for trespasses upon the whole space, and to reduce the amount, so as to be a fair compensation for the trespasses to the part inclosed for twenty years. This will avoid the necessity of a new trial. If the defendant requires it, the verdict will be entered for the plaintiff as to part, and the defendant as to the other part of the close in which, &c.; and if our judgment be wrong, the objection will be on the record."

COMMON Farriers. Farriers and smiths who open shops by the roadside, and profess to physic and shoe the horses of travellers, are bound to exercise their craft in favour of all travellers passing along the road on tender of the customary hire. Keilw. 50, pl. 4; Raym. 654; Add. *Cont.* 457. *See* Farrier.

COMMON Ferrymen. Common ferrymen are bound by law to convey across their ferry, at customary and seasonable hours, all travellers who present themselves, and are able, and ready and willing, to pay the customary gratuity; and they are bound to provide a boat and tackle in good order and condition, together with able and expert boatmen to fulfil the duties of the office. *Payne v. Partridge*, 1 Show. 140. *See* Ferry.

COMMON Informer. *See* Penal Action.

COMMON Law. That portion of the municipal law which is administered by the common-law courts. Broom's *Com.* 3.

COMMON-Law Procedure Acts. 15 & 16 Vic. c. 76; 17 & 18 Vic. c. 125; 23 & 24 Vic. c. 126.

COMMON Lodging-Houses. *See* Bankruptcy, vol. ii. p. 141; Bawdy-house, id. p. 386; Inn; Lodging-house.

COMMON Pleas. The Court of Common Pleas, besides its concurrent jurisdiction with the other superior courts, has a special cognisance of real actions, which, however, are now of comparatively rare occurrence. It has also an exclusive jurisdiction in complaints against railway and canal companies under the Railway and Canal Traffic Act. It is the court of appeal from the decisions of revising barristers under the stat. 6 & 7 Vic. c. 18; and the certificates of acknowledgments by married women under the act for the abolition of fines and recoveries (3 Wm. 4, c. 74), with the affidavits verifying them, are filed of record in this court, in pursuance of the 85th section of that statute. *See*, as to the origin of the court, Broom's *Com.* p. 32, *et seq.*

COMMON, Tenants in. *See* Tenants in Common.

COMMANDITE, or Société en Commandite.[1]

[1] A special or limited partnership in France, where the contract is between one or more persons who are general partners, and jointly and severally responsible, and one or more other persons who merely furnish a particular fund or capital stock, and thence are called *commandataire*, or *commenditaires*, or partners *en commandite*; the business being carried on under the social name or firm of the general partners, only composed of the names of the general or complimentary partners, the partners in

COMMONS, House of. *See* Election; Parliament; Privilege.

Privilege with Respect to Publications by order of.

STOCKDALE v. HANSARD, 9 E. & E. 1; 2 Per. & D. 1; 8 Dowl. 148.

It is no justification of a libel that it was printed and published by order of the House.

Upon a plea justifying a libel, that it was printed under an order of the House of Commons, and published pursuant to a resolution of the House, the court held that it was competent to the court to inquire into the existence and legality of such privilege, and that such power to order the publication of papers containing defamatory matter did not exist in the House of Commons.

STOCKDALE v. HANSARD, 8 Dowl. 522; 3 Per. & D. 330.

And where an action was brought for such libel the sheriff under an execution cannot return that he was ordered to retain the money levied by the House of Commons.

The sheriff returned to a writ of *venditione exponas* that he had caused the goods to be sold and had the money to render. The sheriff having been summoned to show cause why he should not pay over the money, *Patteson, J.*, refused to make the order upon him at chambers. The writ was returned on the 19th of December. On the first day of the following term, January 11th, a rule was obtained calling on the sheriff to show cause why he should not pay the money to the plaintiff or his attorney. He showed by way of causes against the application, first, that on the 15th of January he had been served with the copy of an order of the Insolvent Debtors' Court (made under 1 & 2 Vic. c. 110, s. 89), requiring him to show cause why the money should not be paid to the provisional assignee of the estate of the plaintiff, who was an insolvent; secondly, that certain resolutions were passed on the 21st of January by the House of Commons, to the effect that the money had been levied in contempt of the privileges of the House; that the sheriff be ordered to refund it to the defendants; and that the sheriff, having been guilty of a contempt and breach of privilege, be committed to the custody of the serjeant-at-arms.

The court held, that neither cause was sufficient. Rule absolute.

If he does not pay it over, an attachment lies.

A rule having been subsequently obtained for an attachment against the sheriff for not paying over the debt and costs pursuant to the above rule and the master's allocatur,—

The court held, that neither the order of the Insolvent Debtors' Court, nor the resolution of the House of Commons as stated above, were sufficient causes to prevent the rule from being made absolute.

STOCKDALE v. HANSARD, 11 Ad. & E. 297; 3 Per. & D. 330; 8 Dowl. P. C. 669.

But under 3 Vic. c. 9, the Speaker's certificate is a stay of proceedings.

This was an action for a libel contained in a work purporting to be a report of the Inspectors of Prisons for the Home department. The action was commenced by a writ of summons, dated the 13th of February; the declaration on the 9th of March, and interlocutory judgment signed on the 18th of the same month. The return was enlarged until the fourth day of this term. On the 25th March the attorney for the defendants attended before Mr. Justice Williams at chambers, with the following certificate of the Speaker, verified by affidavit, pursuant to 3 Vic. c. 9, s. 1:—

"In the Queen's Bench, between John Joseph Stockdale, plaintiff, and James Hansard, Luke Graves Hansard, and Luke James Hansard, defendants. I, the Right Honourable Charles Shaw Lefevre, Speaker of the House of Commons, by authority of and pursuant to a statute made and passed during the present year of our sovereign lady Queen Victoria, intituled 'An Act to give

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commandite being liable to losses only to the extent of the funds or capital furnished by them. Story on Partn. s. 78. Wordsworth on Joint-Stock Companies, 2; 3 Kent's *Com.* 34. This kind of partnership has been introduced into American law, and is authorised by the statutes in several of the states. (Id. 35.) *See* Joint-Stock Companies, Limited.

Summary Protection to Persons employed in the Publication of Parliamentary Papers,' do hereby certify, that the book and paper respectively mentioned in the declaration in this cause, and therein respectively described as a book of reports of the Inspectors of the Prisons of Great Britain, and a certain printed paper purporting to be a copy of the reply of the Inspectors of Prisons for the home district with regard to the report of the Court of Aldermen, to whom it was referred to consider the first report of the Inspectors of Prisons as far as related to the gaol of Newgate, and being the publications in respect whereof the action (such action having been commenced by virtue of a writ of summons bearing date the 13th of February last), hath been commenced and prosecuted, were and are the books of reports and paper published by the above-named defendants, by vote and under the authority of the House of Commons.

"Given under my hand, in pursuance of the statute in that case made and provided, this 20th of April, in the year of our Lord 1840. Charles Shaw Lefevre, Speaker of the said House of Commons."

Notice of this certificate had been given by the defendants to the plaintiff on the 22nd. Mr. Justice Williams having declined to stay proceedings on the production of this certificate at chambers, application was made to the court.

Per Cur. The act is imperative. The Speaker has certified that this action is in respect of a publication by authority of the House. The rule must be absolute.

COMMUNIS Error facit jus. *Common Error sometimes passes current as law.* Broom's *Max.* 132. That this maxim must be received with caution, see *Isherwood v. Oldknow*, 3 M. & S. 396 : *per Lord Ellenborough. Garland v. Carlisle*, 2 C. & M. 95: *per Vaughan, B.*

COMMUTATION of Tithes. *See* Tithes.

COMPANY. *See* Joint-Stock Company.

COMPENSATION. *See* Lands Clauses Consolidation Act.

COMPOSITION with Creditors. *See* Forsyth's Composition with Creditors. *Ante*, Accord and Satisfaction, vol. i. p. 88.

As to Composition Deeds binding those who do not sign by virtue of the Bankrupt Act, *see* vol. ii. p. 286.

(A) *Of the Nature and Requisites of the Deed or Composition Contract*, p. 155.

(B) *Of the Assent of Creditors*, p. 156.

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(F) *Of the Avoidance of the Deed or Composition Contract*, p. 158.

(G) *Of Collateral Parties, Sureties, and Trustees*, p. 159.

(H) *Actions, Pleadings, and Evidence connected with*, p. 159.

(I) *Of Composition as connected with Bankruptcy*, p. 160.

(A) *Of the Nature and Requisites of the Deed or Composition Contract.*[1]

[1] The essential requisites to create a valid and binding agreement by creditors with their debtors for the liquidation or temporary discharge of their debts, are, first, that there be a sufficient legal capacity in the parties; secondly, that if the agreement be not under seal, there be an adequate consideration for entering into it, and that in

(B) *Of the Assent of Creditors.*[1]
(C) „ *Consideration for such Assent.*[2]

all cases the contract be *bonâ fide;* and thirdly, that the parties assent to the agreement.

The manner in which the debtor compounds or arranges with his creditors must necessarily depend on the circumstances of each particular case. The instrument or document of exoneration is generally under seal; and where it is intended to operate as a release or discharge at law of a specialty claim, it is essential that it should be so (*see* 7 Price, 604. *Tupper v. Foulkes*, 30 L. J. C. P. 214); for, to a contract under seal, an agreement not by deed by the plaintiff with other creditors to give time, or accept a composition, cannot be pleaded at law as an answer to an action, though equity will sometimes relieve. 16 Ves. 372.

In practice it is usual for the creditors to sign a preliminary agreement to accept the composition, in which case it is prudent to insert a stipulation that the creditors shall, on being required, sign a formal deed.

[1] The assent of the creditor to the composition contract may either be express or implied (*Butler v. Rhodes*, 1 Esp. 236. *Ellis v. Ollave*, 3 Salk. 60); and a verbal promise to accept a composition and execute the deed will prevent the creditor from suing for the original cause of action (*Bradley v. Gregory*, 2 Camp. 383), provided the original debt be not founded upon an instrument under seal. *Lowe v. Eginton*, 7 Price, 604. But if a party assents to a composition-deed, and he is afterwards refused to be allowed to sign, his original rights revive. *Garrard v. Woolner*, 8 Bing. 258; 4 C. & P. 471.

When some or all of the creditors join together and agree to take a portion of the debts due to them in satisfaction and discharge of such debts, and not to sue the debtor, the joint agreement to accept the composition and relieve the debtor from his embarrassments, is a sufficient consideration to each of them, for the promise or agreement of each to accept the composition and discharge the debtor; and if the agreement be carried into effect by the payment and receipt of the composition, there is a good accord executed, which is pleadable in discharge of any action brought by a creditor, who is a party to the composition-agreement for the recovery of the residue of his debt. See *Norman v. Thompson*, 4 Ex. 755.

If a debtor make an assignment of all his property for the benefit of such of his creditors as shall come in and execute the deed, and any of the creditors communicate with the trustee and assent by word of mouth to the transaction, so as to create the relationship of trustee and *cestui que trust* between himself and the trustee, the assignment cannot afterwards be revoked. *Harland v. Burks*, 15 Q. B. 720.

An assignment by a debtor, who is sued by one of his creditors, of all his effects to trustees for the benefit of all his creditors, is valid and effectual, although the particular creditor, who is prosecuting his action, will be delayed and hindered thereby. The deed is not invalidated by a clause enabling the trustees to employ the debtor in carrying on his trade for the purpose of winding up his affairs. *Janes v. Whitbread*, 11 C. B. 406; 20 L. J. C. P. 217. *Pickstock v. Lyster*, 3 M. & S. 371. But a deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditors, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed purports on the face of it to be for the benefit of all the creditors. Such a deed is, in truth, a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor in fraud of the other creditors. *Smith v. Hurst*, 22 L. J. Ch. 289.

When creditors agree to give time, but require that the debtor's affairs shall be investigated and his future business superintended by them or their representatives until the debts have been paid, the instrument is usually a bond or deed of inspection. This document is generally entered into between the debtor of the first part, the trustees or inspectors of the second part, and the creditors of the third part, and by which the creditors covenant not to molest the debtor for an indefinite or definite period, but to give him license to carry on his trade or profession for their benefit, his affairs, &c. being subject to the inspection of such trustees or inspectors, who are usually invested with powers to inspect books and vouchers, and generally to regulate the trade.

In instances where a trader appears to be in insolvent circumstances, his creditors, for reasons of policy or humanity, frequently allow him a longer time for the payment of his debts, by granting him an instrument or writing called a letter of license. The general object of this is, to protect him from arrests in going about his affairs. It usually confers a privilege on the debtor to be exempt from arrest, and also to compound his debts; and the creditors in general severally covenant, that if the debtor shall receive any molestation or hindrance from any of them, he shall be acquitted and discharged of his liabilities as against such creditors.

[2] At law, an agreement not under seal to give and receive a less sum than 20s. in the pound is not binding without some new and sufficient consideration: as, for instance, the appropriation of a fund for the liquidation

Maltby v. Carstairs, 7 B. & C. 735 ; S. C. 1 M. & R. 549.

A composition-deed is only an extinguishment of the debts included in the deed, and between the immediate parties.[1]

K. & Co. being bankers of A., and holding real as well as personal securities for any balance on cash advances, or on bills drawn or accepted or indorsed by him, received some of his acceptances for the accommodation of E. & Co. from M. another of their customers, as a security for his own notes ; A. becoming bankrupt, E. & Co. entered into a deed of composition with their creditors, to which the assignees of A. and also K. & Co. were parties : but they executed it only upon receiving from the assignees of A. a written assurance that they should not thereby prejudice the real security they held from A. By that deed, reciting that certain of the creditors of E. & Co. were the holders of bills as securities for their debts owing from the partnership, and drawn upon or accepted or indorsed by A., and that the provisions to be made were to be accepted by the creditors, parties thereto, in full satisfaction of their debts, as well against E. & Co. as against the estate of A. in respect of the said bills drawn, accepted, or indorsed by them ; and the deed contained releases to E. & Co. and their sureties therein named (but not to A.), of all such bills, and covenanted to deliver up the same, which K. and Co. accordingly did to the trustees named in the deed ; and E. & Co. in settling the accounts with A.'s assignees, delivered his acceptances, &c., over to them. K. & Co., after satisfying their demands on A. in respect of cash advances to him out of the proceeds of the real securities, claimed also to hold the surplus in satisfaction of their claim against A. in respect of such bills,—

The court held that they were entitled to do so. The composition-deed did not extinguish the debt due to them from A. upon those bills, although E. & Co. were thereby released ; by delivering up such bills, the creditors did not give up any means of satisfaction already in their hands.

(D) *Of the Construction*[2] *and Effect of the Deed or Composition Contract.*[3]

(E) *Of Fraudulent Preference.*

Howden v. Haigh, 3 Per. & D. 661.

If a creditor signs a composition deed upon receiving a security for the remainder of his debt, he can recover neither the composition

By certain articles of agreement, the plaintiff and the other creditors of the defendants agreed to accept 5*s.* in the pound upon their respective debts, upon the execution of the articles, by promissory notes at two months, with a satisfactory security for their payment ; and the further remaining sum of 15*s.* in the pound, to be paid by the defendant's own notes, by three equal instalments, at six, nine, and twelve months from the date thereof. At the same time it was privately agreed between the plaintiff and the defendants, that they should indorse over to him, as an additional security, a bill of exchange accepted by

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of the claim (*Heathcote v. Crookshanks*, 2 T. R. 24), or the whole or part be guaranteed by a surety (*Steinman v. Magnus*, 11 East, 390; 2 Camp. 124. *Bradley v. Gregory*, 2 Camp. 383), or by the assignment of the debtor's effects (*Butler v. Rhodes*, 1 Esp. 236).

[1] But if it be signed by a majority in number representing three-fourths in value of the creditors, and the other formalities specified in the 192d and following sections of the 24 & 25 Vic. c. 134 are observed, it will bind those who do not as well as those of the creditors who do sign it. *See* vol. ii. p. 286.

[2] Deeds or instruments of composition are generally construed liberally, so as to give full effect to them; and though as against the debtor they will in some cases be construed strictly, yet equity will assist a composition of debts, if obtained without fraud and upon a fair r presentation. 1 P. Wms. 571; 1 Vern. 210; 3 Atk. 583; 2 id. 527; 16 Ves. 372.

[3] As between the parties to the deed, the acceptance of a composition-deed deprives the creditor of his original rights so as to suspend his remedy. *Tullock v. Smith*, 6 Bing. 339 ; 3 M. & P. 676. Taking a composition from the acceptor of a bill and giving up the bill is a satisfaction of the bill as regards other parties. *Stonehouse v. Read*, 3 B. & C. 669 ; 5 D. & R. 603. But an acceptance of a composition from one of two parties jointly liable does not discharge the other, unless received in full satisfaction. *Walters v. Smith*, 2 B. & Adol. 889. *Fitch v. Sutton*, 5 East, 230.

An agreement by a creditor to accept part of his debt by composition, and another part by full payment, is not binding, being an accord without satisfaction. *Greenwood v. Ledbetter*, 12 Price, 183.

nor upon the other security.[1]

certain other persons, to induce him to execute the articles of agreement, which was done before his execution of the articles.

The court held, that this private agreement was a fraud upon the other creditors, and vitiated the whole transaction as regarded the plaintiff, and disabled him from recovering upon the notes, which had been given to secure the remaining 15*s.* in the pound, as well as the composition itself.

(F) *Of the Avoidance of the Deed or Composition Contract.*

OUGHTON v. TROTTER, 2 Nev. & M. 71.

Where creditors agree to a composition, provided notes be given within a certain time, if not given within the time, they may resort to their original rights.[2]

At a meeting of the creditors of Edward Trotter, held 7th day of April, 1831:—"Resolved, that the offer of 6*s.* in the pound as a composition be accepted by the undersigned; and that, therefore, the necessity for an assignment to trustees be superseded: such composition to be made in two payments by the joint and several promissory note of W. W. Cox and E. Trotter. A release to be executed to E. Trotter, with the usual proviso, that, if the instalments be not punctually paid, the release shall be void. The notes to be given within fourteen days, the creditors assenting thereto within that time." It did not appear that any further step was taken until the 31st of May. An application was made to the plaintiff on that day to execute a release to the defendant, which he refused, and brought this action for goods sold, &c. It was objected for the defendant, that, as the plaintiff had agreed to take a composition for his debt, he could not bring an action for the original demand. A verdict was thereupon taken for the defendant.

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[1] This doctrine has been recently affirmed in the case of *Atkinson v. Denby*, 30 L. J. Ex. 361, in which a bill of exchange had been obtained pursuant to a secret agreement as a consideration for entering into a composition-deed, and had been afterwards paid by the debtor to the creditor to whom it was so given. The court held that the money so paid on the bills of exchange might be recovered back. It was contended that the debtor was a party to the fraud, and could not therefore claim a return of the money. The same answer was made by the Court of Exchequer to this argument which had previously been made to a similar argument by *Lord Ellenborough* in *Smith v. Cuff*, 6 M. & S. 160, where his Lordship said: "This is not a case of *par delictum;* it is oppression on one side and submission on the other. It never can be predicated as *par delictum* when one holds the rod and the other bows to it." *See* vol. ii. p. 437.

As all parties to a composition-deed are supposed to be in the same situation, one has no right to split his demand so as to gain a preference. *Britten v. Hughes*, 5 Bing. 460; 3 M. & P. 79. A creditor who refused to take a composition unless a policy of insurance be assigned, commits such a fraud on the other creditors that he cannot retain it. *Alsager v. Spalding*, 4 Bing. N. S. 407. So a security given by a third person to induce a creditor to sign is void. *Coleman v. Waller*, 3 Y. & J. 212. And a note given for a composition is void, if the creditor has derived a benefit from a third person in consideration of taking the composition. *Knight v. Hunt*, 5 Bing. 429; 3 M. & P. 18. But in debt on bond; plea, that it was obtained in fraud of the defendant's other creditors; it appeared that the party, with other creditors, had agreed to a composition and to release the defendant, and that divers of them signed the deed of which the party had notice, but that two years after, having received no part of the composition, the defendant executed the bond. The court held the bond good: it is the pretending to accept the same terms as the other creditors, and so encouraging them to come into the composition, when the party so pretending has at the time secured to himself some advantage of which the others are not to partake, which constitutes the fraud on the other creditors. *Took v. Tuck*, 4 Bing. 224; 12 Moore, 435. But if, after the composition has been settled and done with, the former debtor thinks fit to present to any one of his former creditors a sum of money, by way of making good the former deficiency, there is no legal objection to his so doing. Add. *Contr.* 140.

[2] Under a composition secured by a third party by bills, on the dishonour of the bills the debtor's liability revives. Accordingly, where the plaintiffs, with other creditors, entered into an agreement with the defendant, whereby he agreed to pay them a composition of 15*s.* in the pound, by two instalments; and a surety, in consideration of the creditors discharging the defendant from all debts and demands on receiving such 15*s.* in the pound, agreed to pay a sum of money in part payment of the first instalment, and to accept a bill of exchange drawn by the defendant in part payment of the second, the creditors agreeing "to exonerate and discharge the defendant on payment of the said 15*s.* in the pound." It was further agreed, that several bills of

The court held, that the delivery of the notes to the creditors within the fourteen days was a condition to be performed by the debtor; failing which, the creditors were remitted to their original rights.

(G) *Of Collateral Parties, Sureties, and Trustees.*

ROSE v. EDWARDS, 1 Mee. & W. 734; 1 T. & G. 975.

A party being insolvent, assigned over his stock to his brother, carrying on a different trade, in consideration of his securing 2*s.* 6*d.* in the pound of a composition of 5*s.* made with the creditors; he continued to manage the business for the brother, whose name was over the door, and upon an application by a creditor for payment of the composition offered a bill, exceeding the amount, with his brother's name as indorser on it, but without authority; and an agreement was made that the balance should be made up in goods to be supplied for the shop; the brother's wife, who occasionally went to the shop, being a consenting party. Upon the dishonour of the bill, and an action against the brother on the bill and for goods, the jury finding that there was a general authority to buy goods for the shop, and that the goods were not sold on the credit of the bill alone, but on that of the brother,—

A. assigned his trade to B., his brother, in consideration of his securing a composition; A. still carried on the trade for B.:—*Held*, that B. was liable for goods ordered by A.[1]

The court held that the value of the goods might be recovered, although the jury negatived the indorsement on the bill being the defendant's, and that he had ever had notice of the dishonour.

(H) *Actions,*[2] *Pleadings, and Evidence connected with.*

REAY v. RICHARDSON, 2 C., M. & R. 422.

To a declaration on three bills of exchange, the defendant pleaded, that he was also indebted to E. F. and to divers other persons in divers other sums of money, of which the plaintiffs had notice; and that afterwards and before the said bills became due, and whilst he was so indebted to the said E. F. and the

A plea of composition must show that the condition on which the

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exchange, the amount of which was equal to the residue of the sum payable on the composition before indorsed by the defendant and handed over to the plaintiffs, should "be considered as in part payment of the said 15*s.* in the pound." The court held, that the bills left in the hands of the plaintiffs were not, under the agreement, to be considered an absolute payment, but that the liability of the defendant thereon still continued, and might be resorted to on the dishonour of the bills. *Constable v. Andrew*, 2 C. & M. 298.

A creditor who signs a composition-deed upon the faith of the debtor's representation as to his effects, is not bound by the composition if it should turn out that he fraudulently suppressed the fact of his having certain property. *Vine v. Mitchell*, M. & Rob. 337. *Wenham v. Fowle*, 3 Dowl. 43.

A plea that the defendant was discharged under a composition by the law of Scotland is not sufficient, unless it disclose a defence by the law of England. *Woodham v. Edwards*, 1 Nev. & P. 207.

[1] Where the defendants (trustees under an assignment of the stock-in-trade of A.) directed the plaintiff to proceed to B. to effect the liberation of A., and arranged that L. should remit funds for that purpose to the plaintiff there:—*Held*, that the letter of L. was inadmissible as proof of the facts stated in it: held also, that the acts of a party put into the shop of A. to conduct the business might bind the defendants in what concerned the business, but not to employ a person to take stock. *Lawrence v. Thatcher*, 6 C. & P. 669.

An assignment by a debtor to a trustee, which might make the creditors partners, is not valid. *Owen v. Body*, 6 Nev. & M. 448; 5 Ad. & E. 28. *See* 25 L. J. C. P. 277.

A creditor who signs a composition-deed, but omits to insert the amount of his debt against his name in the schedule, may, after notice of the amount, sue the trustee, who covenants to pay. *Daniel v. Saunders*, 2 Chit. Rep. 564. If, after a commission is issued, it is agreed between the creditors and a friend of the bankrupt, that the funds shall be vested in a trustee, who shall give his note for 5*s.* in the pound, and the commission not to proceed, but the agreement to be void in case any of the creditors to the amount of 10*l.* refuse within fourteen days; and the notes are given; but a creditor refuses to execute, and the commission proceeds; the notes cannot be enforced by a creditor. *Enderby v. Corder*, 2 C. & P. 203.

Trustees under a composition-deed, who pay out an execution under a mistake of fact, are not entitled to recover the money back. *Harris v. Lloyd*, 5 Mee. & W. 432.

[2] If one of several partners sign a composition-deed he must sue alone. *Metcalfe v. Bycroft*, 6 M. & S. 75. A deed containing

plaintiff entered into it has been performed.[1]

said other persons, he (the defendant) became insolvent and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing, and of enabling the said defendant to induce the other creditors of the defendant to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the said plaintiffs, half the amount of the said bills when the same respectively became due, the said plaintiffs agreed to accept a composition of one-half of the amount of the bills as they became due; and that afterwards the said agreement so made and entered into by the plaintiffs was, by the defendant, with their knowledge and by their direction, represented and made known to the said E. F., so being such creditor as aforesaid; who, thereupon, in consideration of the premises and in faith of that agreement, was led and induced to accept that composition; and that he, the said E. F., had not at any time since recovered or received, or sought to recover or receive, any greater or other sum than half the amount of his said debt. On motion in arrest of judgment,—

The court held the plea was bad, inasmuch as it did not show that all or the great body of the defendant's creditors had come into the arrangement and agreed to take the composition.

(I) *Of Composition as connected with Bankruptcy.*[2]

a covenant not to sue should be pleaded as a release, or the deed should be set out, so as to enable the court to judge of its effect. *Wilson v. Braddyle*, 23 L. J. Ex. 227; 9 Ex. Rep. 718. *See* 8 C. B. 483; 19 L. J. C. P. 74; 5 E. & B. 367.

[1] A plea that the plaintiff agreed to accept a composition, but without averment of tender or money paid into court, is bad. Thus, where there was a plea of non-assumpsit as to all except £ and as to that sum that plaintiff and all defendant's other creditors agreed to accept a composition of 5*s.* in the pound, to be paid at certain dates; and that the defendant was always ready and willing to pay, but no tender or payment into court was alleged or shown, the court held that the plea was no answer as to the sum agreed to be taken, there being no consideration for the plaintiff's discharging the defendant from payment of it; the money should have been paid into court. *Cooper v. Phillips*, 1 C., M. & R. 649; 5 Tyr. 166.

If a defendant has entered into a deed of composition with his creditors, containing the usual clause of release, and the plaintiff has executed the deed as a creditor for a certain sum, that is a good defence to an action by the plaintiff as indorsee of a bill to a larger amount, of which the defendant was indorser, and which then lay dishonoured in the plaintiff's hands; but it is no defence as to two similar bills, also of larger amount, which the plaintiff had paid away, and which were then in the hands of third parties. *Margetson v. Aitken*, 3 C. & P. 338.

The plaintiffs agreed to accept a composition, the balance to be afterwards ascertained; a dispute arose as to the actual balance:—*Held* that the plaintiffs, claiming a larger amount, dispensed with a formal tender. *Reay v. White*, 1 C., M. & R. 748; 3 Tyr. 596.

A letter is evidence of an agreement to take a composition; and a previous conversation is evidence to show the motives under which the letter was written.

The defendant being unable to pay his debts, an agreement for a composition with his creditors was prepared, by the terms of which each of the undersigned creditors, in consideration of the agreement therein contained on the part of the others, agreed with the others and with the defendant to accept a composition of 10*s.* in the pound. Some creditors having signed it, the plaintiff, who was a creditor, said to D., the defendant's agent, that he would not sign it until L., another creditor, had signed it. D. thereupon induced L. to sign the paper; but the plaintiff refused to sign it notwithstanding:—*Held*, that a mere promise by the plaintiff to the defendant that he would sign it if L. signed, did not prevent the plaintiff from suing the defendant for his original debt; nor was there any defence to the action even if it was to be assumed that D., as the plaintiff's agent, and by his authority, induced L. to sign the document on the faith that the plaintiff would afterwards sign it; since the paper in express terms purported to be an agreement between those creditors only who signed: consequently, that L., by signing the document, entered into no agreement with the plaintiff, who had not signed. The plaintiff, however, on the above assumption that D. was his agent, might be liable to an action for a breach of the promise to sign the composition-deed. *Boyd v. Hind*, 26 L. J. Ex. 164; 1 H. & N. 938. *See* 4 Mee. & W. 123; 2 Man. & G. 667; 16 Mee. & W. 181.

When a debtor compounds with his creditors, and each creditor signs the same deed, covenanting either to give a further day of payment or to take a certain sum as a composition, the whole being one transaction, a separate stamp for each person is never required. *Bowen v. Ashley*, 1 N. R. 274.

[2] *See ante*, vol. ii. pp. 285, 299, 303, 306, 327, 339, and 341.

COMPOUNDING.

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I. Compounding Penal Action.

(A) *Leave of the Court must be obtained.*

Leave of the court must be obtained.

By 18 Eliz. c. 5, s. 8, and 27 id. c. 10, it is enacted, "that no common informer or plaintiff shall or may compound or agree with any person that shall offend, or that shall be surmised to offend, against any penal action for an offence committed, or pretended to be committed, but after answer made in court to the information, or suit in that behalf exhibited or presented; nor after answer, but by the order or consent of the court in which same information or suit shall be depending, upon the pains and penalties therein set down and declared;" that is to say, by sect. 4, such informer is upon conviction to stand in the pillory (now abolished) for two hours, and shall for ever be disabled from being plaintiff or informer in any penal action, and forfeit 10*l.*, half to her Majesty, and half to the party grieved.[1]

(B) *And Notice given to the proper Officer where Part of the Penalty goes to the Crown.*[2]

[1] These acts only apply to common informers, and not to the party grieved (*Kirkham v. Wheeley*, 1 Salk. 30); and do not extend to a case where an action has not been actually commenced. *Gordon v. Powis*, 2 Black. 781. Giving leave to compound is discretional in the courts (*Howell v. Morris*, 1 Wils. 79. *Beller v. Beale*, cited 1 Tidd. 575, 7th edit.); therefore a *bonâ fide* (*Wood v. Johnson*, 2 Black. 1157), but not a collusive composition, will be permitted. *Wood v. Cassin*, id.

Penal actions can only be compounded by leave of the court, and not of a judge at Nisi Prius (*Morgan v. Lute*, 1 Chit. Rep. 381); and the application should be made early, but under special circumstances it has been allowed after verdict (*Crowder v. Wagstaff*, 1 B. & P. 18. *Maughan v. Walker*, 5 T. R. 98); and even where the defendant was in execution. *Bradshaw v. Mottram*, 1 Stra. 167.

And where proceedings in a penal action are stayed on payment of a sum of money, this is a sufficient undertaking on the defendant's part to pay that sum, to authorise the granting of an attachment on non-payment. *King v. Clifton*, 5 T. R. 257. *Hart v. Draper*, 7 Taunt. 43; S. C. 2 Marsh. 358.

By the 18 Eliz. c. 5, s. 4, it is a misdemeanor to compound penal statutes unless the court consents; and it has been holden that a party is liable to the punishment prescribed by that act for taking the penalty imposed by a penal statute, though there has been no proceeding for the penalty (*Rex v. Gotley*, 1 R. & R. 84); but the stat. 18 Eliz. c. 5, does not apply to offences cognisable only by a magistrate; and an indictment for compounding such transgressions was therefore holden bad. *Rex v. Crisp*, 1 B. & A. 283.

[2] The proper officer on the part of the crown is the Solicitor of the Treasury, and

And notice given to the proper officer, where part of the penalty goes to the Crown.

Reg. Gen. H. T. 1853, r. 118. "Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer, but in other cases it may."

(C) *Application and subsequent Proceedings.*[1]

(D) *Payment of the Share of the Crown must be made to the Master of the Crown Office in the Queen's Bench.*

Payment of the share of the Crown must be made to the Master of the Crown Office in the Queen's Bench.

Reg. Gen. H. T. 1853, r. 120. "When leave is given by the Court of Queen's Bench to compound a penal action, the Queen's half of the composition shall be paid into the hands of the Master of the Crown Office for the use of her Majesty."

(E) *The Rule must contain an Undertaking to Pay the Sum for which the Action is Compounded.*

The rule must contain an undertaking to pay the sum for which the action is compounded.

Reg. Gen. H. T. 1853, r. 119. "The rule for compounding any *qui tam* action, shall express therein that the defendant thereby undertakes to pay the sum for which the court has given him leave to compound such action."

II. Compounding Criminal Proceedings.

(A) *Compounding a Public Offence, which could not be the Subject-matter of a Civil Action, is Illegal.*[2]

Keir v. Leeman, 6 Q. B. 308.

Compounding a public offence, which could not be the subject-matter of a civil action, is illegal.

The question was raised on demurrer to a plea whether an agreement for the payment of a sum of money in consideration of the plaintiff withdrawing from prosecuting an indictment, which charged the defendant with riot and assault upon the plaintiff in the execution of his duty as a sheriff's officer, could be enforced. *Cur. ad. vult.*

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on the consent of the attorney-general the court generally gives leave as a matter of course. *Sheldon v. Mumford*, 5 Taunt. 268. *R. v. Gibbs*, 3 Dowl. 345.

[1] The application must be founded on an affidavit stating the amount of the penalty, the statute imposing it, the state of the cause, and the agreement of the parties as to the terms of composition. When the Crown is concerned, the plaintiff's attorney, after giving notice of motion to the Solicitor of the Treasury, delivers to him a copy of the affidavit, with the declaration and plea, and afterwards these are returned with a consent brief on the part of the attorney-general on payment of the fees. A consent brief must then be signed by the plaintiff's counsel, and also one by defendant's counsel. The three briefs and affidavits are then taken to the Master's office and the rule is drawn up, and this being served on the defendant's attorney, the latter attends and pays the money to the officer of the court, who afterwards pays one moiety to the plaintiff, on the latter being identified by his attorney.

[2] *Reg. v. Best*, 9 C. & P. 368; 2 Mood. C. C. 124. In *Reg. v. Daly*, id. 342, on an indictment for stealing cloth, the prosecutor admitted, in consequence of some conversation he had with the prisoner on the subject of the robbery, he had signed a certain paper to forgive him, and not prosecute according to law in any court of justice, provided he, the said prisoner, did make known the whole of the circumstances which might in any way or manner tend to lead to a recovery of the said property.

Gurney, B., said, the law does not authorise any private person to forego a prosecution upon any terms; and that such a promise was not binding and illegal.

The offence of compounding felony has always been deemed highly penal. It was formerly holden to render the party an accessory to the original crime (*see* 4 Bl. Com. 134); but now it is only a misprision, and punishable by fine and imprisonment. *See* 1 Hale, P. C. 546. *Keir v. Leeman*, 6 Q. B. 308; 5 East, 294; 12 L. J. Q. B. 124.

A misdemeanor cannot be compounded; therefore a bond given for such a purpose is illegal (*Collins v. Blantern*, 2 Wils. 341); but where the offence more immediately affects individuals, it is not unusual for the parties to declare themselves satisfied (*see* Cro. C. C. 21); as where a person had been convicted of ill-treating a parish apprentice, the court offered that, if he would pay a certain sum for the expenses of the prosecution, the sentence should be for a shorter period of imprisonment; and a note given by him for such sum was holden unobjectionable. *Bailey v. Wingfield*, 11 East, 46. *See* 8 Ex. R. 497; 8 Bing. 394; 1 Stark. 467; 16 East, 300; 4 Camp. 46.

Lord Denman, C. J. "The principle of law is laid down by *Wilmot, C. J.*, in *Collins v. Blantern*, 2 Wils. 341, that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused, is founded on unlawful consideration, and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. In the present instance the offence is not confined to personal injury, but is accompanied with riot and the obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise."

(B) *Advertising for the Return of Lost or Stolen Property, with an Intimation that no Questions will be asked, subjects the Advertiser to a Penalty.*

Advertising for the return of lost or stolen property, with an intimation that no questions will be asked, subjects the advertiser to a penalty.[1]

By 24 & 25 Vic. c. 96, s. 182, "whosoever shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions shall be asked, or shall make use of any words in any public advertisement purporting that a reward shall be given or paid for any property which shall have been stolen or lost without seising or making inquiry of the person producing such property, or shall offer or promise in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan on any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of 50*l.* for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit."

COMPROMISE of Suit.

(A) *Authority of Attorney to Compromise.* *See* vol. ii. p. 37.

(B) „ *Counsel to Compromise.* *See* vol. ii. p. 379.

(C) *Parties may Compromise independently of their Attornies, provided it is not done in Collusion to defeat the Attorney's Lien.*[2]

(D) *Offer of Compromise "without Prejudice," not Evidence of an Admission.*[3]

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[1] The receiving of money corruptly for helping to the recovery of stolen property is a felony. 24 & 25 Vic. c. 96, s. 101. *See post*, Larceny.

[2] The parties are at liberty to settle the action without consulting their attornies, but if they *collude* to deprive an attorney of his lien by a *fraudulent* settlement made behind his back, the court will not recognise such settlement, and will not allow the release to be set up as a defence in the action. *Wright v. Burrows*, 3 C. B. 344. *Francis v. Webb*, 7 id. 731. *Jones v. Bonner*, 5 D. & L. 718. *Moore v. Angell*, 11 Jur. 455. *Swane v. Senate*, 2 N. R. 99. *Nelson v. Wilson*, 6 Bing. 568. The attorney's lien attaches upon money received by way of compromise, should the verdict and judgment be against his client. *Davis v. Lowndesten*, 3 C. B. 823; but see *Stretton v. London and North-Western Railway Co.* 15 id. 40. Marshall on Costs, 458.

[3] An offer to pay money by way of compromise is not evidence of the existence of a demand. "It must be permitted," said *Lord Mansfield*, "to men to buy their peace without prejudice to them if the offer did not succeed; and such offers are made to stop litigation, without regard to the question whether anything, or what, is due. *See*

COMPUTE, Rule to, Abolished.

By 15 & 16 Vic. c. 76, s. 92, "no rule to compute shall be necessary or used."

CONCEALING Birth of Child. *See ante*, p. 96.

CONCEALMENT. *See* Fraudulent Concealment; Sale.

CONDITIONS. *See* Bond, vol. ii. p. 504; *post*, Contract, p. 193; Covenant.

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I. Difference between a Condition or Limitation and a Covenant.[1]

Bull. N. P. 236; 1 Esp. 143; 2 id. 530. But in *Wallace v. Small*, 1 M. & M. 446, an offer of a specific sum of money, by way of compromise, and not said to be without prejudice, was held admissible as *primâ facie* evidence of liability. *Wallace v. Small*, *supra*. *See* further on this subject vol. i. p. 204. A payment previous to a compromise of an excise seizure, to which no reference is made, cannot be recovered back. *Atlee v. Backhouse*, 3 Mee. & W. 633.

[1] The term "condition," in a legal, as well as a popular sense, signifies, in general,

II. Condition, how Created.[1]

the reverse of absolute or indefeasible. It imports some quality annexed, either by implication or express declaration, to a real estate, personal chattel, or contract, by which, on the happening of an uncertain event, such estate or contract may be defeated or enlarged. Smith. R. & P. P. 54; Shep. *Touch.* 118; 1 B. & Adol. 715. There are six several kinds of conditions:—

1. A simple condition in deed;
2. A condition subsequent to the estate;
3. A condition annexed to the rent, &c.;
4. A condition that defeats the estate, &c.;
5. A condition that defeats not the estate before an entry; and
6. A condition in the *affirmative*, which implies a negative; as the words "being behind or unpaid," imply a negative, viz. not paid. Co. Litt. 201b.

There are four requisites essential to the validity of a condition:—

1. That it be not in contravention of any statute, nor inconsistent with common law;
2. That it be created by appropriate words;
3. That in the case of real property it restrain the estate:
4. That it give title of re-entry.

In the civil law, conditions are defined to be "pactions which regulate that which contractors have a mind should be done, if a case which they foresee should come to pass. See Domat. lib. i. tit. 1, s. 4. Between a condition and a limitation there is this difference: a limitation marks the utmost time of continuance; a condition marks some event, which, if it happens in the course of that time, is to defeat the estate. The peculiar characteristics which distinguish covenants from conditions are scarcely capable of being delineated by any general rule or clear definition. The text-writers offer no criterion beyond the citation of different examples, given not as illustrations of doctrines antecedently expounded, but as affording in themselves evidence of the difference which exists between the two. It is, however, quite clear that no express form of words is essential to the creation of the one or the other, although the adoption of particular terms might afford some evidence of the intention of the parties. Thus, if a man makes a lease for years by indenture, "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien;" this is both a condition and covenant. Co. Litt. 203, B.; Roll. Abr. 458; Co. Litt. 204. If a man leases for years, and in the indenture there is such a clause—*et non licebit* (to the lessee) *dare, vendere, vel concedere, statum et terminum suum alicui personæ, sine licentiâ* (of the lessor), *subpœna foris facturæ termini prædict'*—this is a good condition (Roll. Abr. 408; Leon. 246); but if a man leases for years, and the lessor covenants that the lessee shall have house-bote, hay-bote, and plough-bote, without committing waste, upon pain of forfeiture of the lease, this is a covenant on the part of the lessor, and therefore no condition; and the covenant is no more than the law appoints: therefore that, and all that is subsequent to it, is void. Cro. Eliz. 604. *See* Platt on Covenants, 71, 72.

[1] *By express Words.*—Conditions are either in deed, that is, expressed by language in the instrument by which they are created, or else in law, that is, implied by the common or statute law. Thus, where a feoffment or lease is made, reserving rent payable at a certain day, with a proviso that if it is not paid on that day the feoffor or lessor may re-enter—this is a condition in deed. Co. Litt. 325; 5 Vin. Abr. 42. An express condition cannot be annexed to an estate without deed (Co. Litt. 225); hence a man cannot plead a condition to defeat an estate without showing an instrument under seal (Co. Litt. 225; Com. Dig. Pleader, O. j., &c.); but a different rule prevails where a condition is annexed to a chattel personal or real, as a term for years (1 Roll. 413, c. 20, 25); and a condition to a freehold may be referred to a matter not in writing, and may be supplied by averment, as if a corody be granted for life, *sic quod per A. prius usitat' fuit*, it may be averred that the corody of A. was upon condition to attend the master, &c. 1 Roll. 413, l. 50; id. l. 52. So, a condition precedent upon which an estate shall be created may be without deed. Co. Litt. 216, a.

By Implication.—An implied condition, or a condition in law, is that which may be legally inferred from the contents of the instrument, without express words being introduced, and is created by the common or statute law; as, if a party grant for the parkership of his park for life, a condition is implied that if he does not perform the duties incident to the office the grantor and his heirs may oust him. Litt. s. 371; Co. Litt. 232 b. 333. So, to the grant of every estate is annexed, by law, a condition implied, that the grantee shall not commit felony or treason. And *Lord Coke* says, there is a condition in law annexed to every estate tail, after possibility of issue extinct, estate by the courtesy, in dower, for life or years, that if the tenants of these estates respectively alien in fee, or claim in a court of law a greater estate than they are legally entitled to, they shall forfeit them, and the persons in remainder or reversion may enter. As to conditions in law founded upon statutes, they may be illustrated by the laws against mortmain, that the grantee of an estate shall not alien it to an ecclesiastical corporation: this may be deemed a statutory condition. So, by the Statute of Marlbridge, tenants for life and years hold their estates upon condition not to commit waste. Conditions founded upon implications in law are as binding and as operative as if they had constituted a component part of the

III. To what Estate or Contract Conditions may be Annexed.

(A) *To what Estate.*[1]

(B) *To what Contract.*[2]

IV. At what time Conditions may be Annexed.[3]

V. To whom Conditions may be Reserved, and upon whom Binding.

(A) *To whom Conditions may be Reserved.*[4]

(B) *Upon whom Binding.*[5]

VI. Of Conditions Precedent and Subsequent.[6]

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express stipulations in the deed. Litt. s. 371; Co. Litt. 232, b; 333, a.

By express Words in a separate Instrument. — The condition may be in the same deed, or indorsed upon the obligation or original instrument (1 Roll. 431, l. 10); or may be contained in another deed. Id. 414. But where terms are introduced in a separate instrument to defeat the force and operation of another, or to affect an estate, it is called a defeasance, and not a condition. A condition to defeat a feoffment of land ought to be contained in the same instrument, or in another deed sealed contemporaneously with the charter of feoffment. *Fowell v. Forrest*, 2 Saund. 48.

[1] A condition may be annexed to an estate of inheritance freehold, or for years, or to a use (Sav. 77); a grant of tithes (1 Roll. 412, l. 53); a devise (Id. l. 1, 25; id. 27); a surrender to the lessor (Id. 412); a surrender of a copyhold (Id. l. 17); or to a release or confirmation of an estate. 1 Rob. 412, l. 22.

[2] Every species of contract may be upon condition (1 Roll. 413, l. 4); and restrictive conditions may be inserted in an attornment (Co. Litt. 274, b; 2 Co. 68, a; 9 Co. 85, b; 1 Roll. 612, l. 45); or in a charter of pardon, or in a letter of denization. Co. Litt. 274, b. But a naturalisation cannot be upon condition, for it is inconsistent with the idea of the absoluteness, purity, and indestructibility of natural allegiance (Id. 129, a); nor can a person resign upon condition, because it is a judicial act to which no condition can be annexed, any more than an ordinary can admit, or a judgment be confessed upon condition, or a condition be released upon condition. Id. 274; 9 Co. 85, b. A party cannot release a personal thing, as an obligation upon a condition subsequent, for a personal right being once suspended is perpetually extinguished. 2 Roll. Abr. 412, 940. But a bond may be released upon a condition precedent, for there the action is not suspended till the condition is performed, as where the release was of an obligation, with a proviso that he who released might enjoy 120*l.* due to J. S. at a day then to come, which being a condition precedent was holden valid. Id. 412. See *Ford v. Beech*, 11 Q. B. 853. *Walmsley v. Cooper*, 11 Ad. & E. 216.

[3] As to the time of annexing conditions there is a distinction to be observed between things executed and things executory: as concerns the former the condition must be created, and annexed to the estate at the time of the grant; hence, where a condition is made in a separate deed, it must be sealed and delivered at the same time with the principal deed (1 Inst. 236, b; Touchs. 126; 3 Roll. Abr. p. 61; 2 Cruise, 3; 2 Saund. 48; 1 Bac. Abr. 634): as regards the latter, such as rents, annuities, &c., it is admitted as a clear principle that payment of them may be restrained by a condition executed after the execution of such conveyance. 1 Inst. 237; Roll. Abr. 590; 1 Bac. Abr. 634.

[4] A condition, or the benefit of a condition, can only be reserved to the donor, feoffor, or lessor, and their heirs, not to a stranger. For, in order to discourage maintenance, it is a maxim of law that nothing which lies in action, entry, or re-entry, can be granted over. And where, in the creation of a condition, no words of limitation are mentioned, the law will reserve the benefit of the condition to the heirs of the donor, feoffor, or lessor, for as these persons are prejudiced by the disposition, it is but reasonable that they should be entitled to the same means of recovering the estate as their ancestors. *See* Litt. sect. 347; Co. Litt. 214; Roll. Abr. 407, 472.

[5] Where an estate is devised to an infant on condition, he is bound to take notice thereof, and perform the condition. *Williams v. Fry*, 2 Lev. 21; 3 Keb. 19; 3 Mod. 20; 1 Mod. 86, 300; Vent. 200. And if the condition be broken during his minority, the land is lost for ever. *Wiltingham's case*, 8 Co. 446, cited Hardr. 11. So, if an estate be made to a *feme covert*, she shall be bound by the condition, because this does not charge her person, but the land. Br. Baron and Feme, cites 45 Edw. 3, 12 D.; 28 Hen. 8, 13, s. 6; 5 Vin. Abr. 118.

[6] A condition precedent is such as ought to be performed before the estate vests, or grant, or gift, or contract takes effect. A condition subsequent is such as defeats an estate, gift, or contract by some subsequent act. Thus, if an estate be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate vests in A. (Show, *Parl. Ca.* 83); or if a man make a lease of land to J. S. for ten years, provided that if he pay the lessor 10*l.* at Michaelmas, he shall have the land to him and his heirs: this is also a condition

precedent, and must be fulfilled ere the estate can take effect. Shep. T. 19. But where a lease is made for years, on condition that the lessee shall pay 10*l.* to the lessor at Michaelmas, or else his lease shall be void, this is a condition subsequent, for here the estate is executed, but its continuance depends upon the breach or performance of the condition. (Id.) So, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter and avoid the estate; in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. Conditions precedent, which are to create an estate, receive a liberal construction, and if the condition is performed as near to the intent as possible, it will be sufficient; but it is a rule, that conditions which defeat estates are to be constituted strictly.

A. and B. were litigant parties in several actions. C. was the attorney of B.; and at a meeting to settle the actions it was agreed between A. and B., in the presence of C., *inter alia*, that C. should give his promissory note at two months, as a collateral security from B. to A. of a sum of 450*l.*; and it was added that all the effects which A. had of B.'s should be delivered up to C. as B.'s attorney. C. signed the note at the meeting immediately after the signing of the agreement:—*Held*, in an action on the note by A. against C. that the delivery up of the effects was not a condition precedent to the right of A. to claim the money. *Irving v. King*, 4 C. & P. 309. Where it was part of a condition precedent to the claim of a sum of 80*l.*, in addition to the purchase-money for a new house, that the pavement in front of the adjoining houses should be laid down by the 21st of April, it was held that the delay of four days, though occasioned by bad weather, which prevented the workmen from proceeding, was sufficient to prevent the recovery of such claim. *Maryon v. Carter*, 4 C. & P. 295. In an action by vendee for non-delivery of goods:—*Held*, that, in an agreement "for the delivery of goods on arrival, to be delivered with all convenient speed, but not to exceed a given day," the arrival in time for delivery by that day is a condition precedent; and if they do not so arrive (without default in vendor) the agreement is null. *Alewyn v. Pryor*, 1 R. & M. 406.

An agreement was made between plaintiff and defendant, that on payment by defendant of certain sums on certain specified days, the plaintiff would grant to the defendant a lease of certain premises, and that the defendant would accept such lease:—It was held that the granting of the lease was not a condition precedent to the plaintiff's right to have the payments. *Baggallay v. Pettit*, 28 L. J. C. P. 169. So, where the defendant covenanted within six months from the passing of a railway bill to pay a sum of money for the purchase of the plaintiff's land, and the plaintiff covenanted that on payment of the money he would convey, the court held the covenant to be independent, and that the defendant was bound to pay the money at the specified time. *Sibthorpe v. Brunel*, 3 Ex. 826.

The plaintiff agreed to supply defendant with a quantity of bricks upon the following terms:—"Terms of payment four months' account, and at the end of four months a settlement shall be made, and eight months longer shall be given on your paying interest at the rate of 5*l.* per cent.; and if a further three months is required it will be given on your paying the current rate of interest on the amount." On the construction of this contract it was held, that the payment of interest was not a condition precedent to the defendant's having the eight months, and three months' further credit. *Dodd v. Ponsford*, 6 C. B. (N. S.) 824.

Where a building has been erected under a contract on a man's own land, the mere fact of the owner taking possession is not a waver of any condition precedent which is unperformed by the contractor, and does not raise any inference of a new contract. *Munro v. Bull*, 8 E. & B. 738; 22 Jur. 1231.

A contract stated the sale of sponge to the plaintiff and the purchase of yellow ochre to be delivered before a certain day:—*Held*, that the delivery of the ochre was a condition precedent. *Parker v. Rawlings*, 4 Bing. 280; 12 Moore, 529. Under a contract for 170*l.* rent for a house, to be suitably furnished:—*Held*, that the furnishing was a condition precedent to the payment of the rent. *Michelen v. Wallace*, 6 Nev. & M. 316.

But a condition in a contract not tending to avoid the entire consideration will not be deemed a condition precedent. *Kemble v. Mills*, 2 Scott, N. S. 121; 1 Man. & G. 757; 9 Dowl. 446.

If a lease contain a proviso that the lessee shall be entitled to determine the lease on giving a certain notice and performing all the covenants to be performed by him, the performance of such covenants is a condition precedent to his right to determine the lease. *Friar v. Gray*, 18 Jur. 1038: H. of L. If a man covenant to spend a sum of money in the alteration and improvement of a house, under the direction of a surveyor to be appointed by the covenantee, the appointment of the surveyor is a condition precedent to the covenantor's liability to expend the money. *Coombe v. Green*, 11 Mee. & W. 480.

Where a landlord granted all the coal lying and being within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay 40*l.* a-year whether the whole of an acre should be gotten or not, it was held that the *finding* of coal was not a condition precedent to the landlord's right to receive the 40*l.* a-year. *Jowett v. Spencer*, 1 Ex. 649.

If by a charter-party of affreightment a

VII. Of Disjunctive Conditions.[1]

VIII. Of the Rules of Construction applicable to Conditions.[2]

shipowner agrees that his ship shall sail to a "safe port" to take in a cargo, the naming of a safe port is a condition precedent to the shipowner's liability to send out the vessel. *Rae v. Hackett*, 12 Mee. & W. 724; 13 L. J. Ex. 216.

A question frequently arises in the construction of contracts whether there is an implied stipulation that the contracting party should continue in a particular business, or live in a particular place, or that some other state of circumstances within his control should continue, or whether the contract is to subsist only while the business is continued by him, &c., so that upon its being abandoned the contract is at an end and no breach arises. Hence, where the declaration alleged that in consideration that the plaintiff would provide horses and waggons for the conveyance of goods between H. and W., it was mutually agreed between the plaintiff and the defendants that the plaintiff should convey all grain, merchandise, and the goods delivered to him by the defendants for that purpose, between H. and W., at the rate of 5*s.* 6*d.* a ton, for the space of one year from the 1st of October, 1857. *Breach*, that the defendants had hindered and prevented the plaintiff from carrying the goods, and had discharged him therefrom. The defendants subsequently had entered into an arrangement with another railway company, by which they had agreed to abandon the traffic in goods between those places, and they gave the plaintiff notice that after the 1st of April they would cease to carry goods between H. and W.:—*Held*, that under the contract alleged, the defendants were not bound to continue the traffic between H. and W., and that there had been no breach of the contract. *Burton v. The Great Northern Railway Co.* 9 Ex. 507; 23 L. J. Ex. 184.

So, if a master binds himself to teach a particular trade to his apprentice, and the latter binds himself to serve the master for a particular time, the continuance of the carrying on of the same trade by the master constitutes a condition precedent to the liability of the apprentice to serve. *Ellen v. Topp*, 20 L. J. Ex. 241.

In *King v. Mansell* (5 H. & N. 106; 36 L. T. 376) an agent for the sale of wine, beer, and spirits, gave a bond to his principal, one of the conditions of which was that he should not engage in or transact any other business in the same trade within ten miles of the town of Y., for himself or any other person as firm. This restriction was held to bind the defendant only during the time he continued in the service of his employers.

If by the express terms of the contract the certificate of the defendant's surveyor is made a condition precedent to the plaintiff's right to payment, and the certificate of the surveyor is wrongfully or fraudulently withheld by collusion with the defendant, the plaintiff's remedy is by action of tort, for he cannot sue upon the contract, notwithstanding the fraud, so long as the condition remains unaccomplished. *Milner v. Field*, 5 Ex. 829. If there is an agreement, whereby a person undertakes to prepare plans and drawings, or to manufacture and work up his own materials, on the terms that he is to receive a certain remuneration if the work is approved, the approval of the work constitutes a condition precedent to his right to recover any remuneration. *Moffat v. Dickson*, 13 C. B. 575. If one is employed to lay out land for building, on the terms that he is to be paid in the event of any part of it being disposed of for building purposes, he is not entitled to any remuneration until some part of the land has been so disposed of. *Moffat v. Laurie*, 15 C.B. 583.

[1] The characteristic quality of these conditions is defined in the terms by which they are known. When the condition is disjunctive, he who ought to do the first act shall have an election to do one or the other (Co. Litt. 145, a); as if it be to enfeoff land, or to pay gold or silver, to deliver one thing or another, the obligor has an election to do the one or the other. 1 Roll. 446, l. 20. So if it be to enfeoff, pay, &c., at the request of the obligee, for his request only ascertains the time of the doing of it (Id. 446, l. 25–30; 467, l. 5); so if it be to do it at Michaelmas, at his request, or at the Feast of Easter (Id. 446, l. 40); but where the disjunctive goes only to the time, and that is referred to the request of the obligee, it gives the election to him; as to do at Michaelmas, or before, at the request of A. Id. 446, l. 35–37. If a condition be in the copulative, but is impossible to be performed, it shall be taken in the disjunctive; as if it be that A. and his heirs or executors do such a thing. (21 E. 4, 44; 1 Roll. 444, l. 26); or that A. and his assigns do perform it. 1 Roll. 444, l. 25. Platt on Covenants, 21, 22.

There is a difference between what is denominated disjunctive absolute and disjunctive contingent; as if a man be bound to pay 10*l.*, or to be enfeoff to a party upon the return of J. S. from Rome; if J. S. die before he returns from Rome the obligation is saved, though the 10*l.* be never paid: but if it is a voluntary act, as to pay 10*l.* or enfeoff you before Michaelmas, then, if the obligor dies before Michaelmas, yet his executor ought to pay the money: *per Popham, C. J.*, Goldsb. 192, pl. 141.

[2] A condition from which the intent of the parties can be collected is good, notwithstanding the most gross incorrectness in language. *Cromwell v. Grumsden*, 1 Ld. Raym. 335; 2 Salk. 462; Com. 447; Holt, 522. *Cromwell v. Grumsdale*, 12 Mod. 193. The words of a condition are liberally expounded to carry into effect the intention of the parties; as if the condition of an obligation be,

IX. Of Invalid Conditions.

(A) *By being Illegal.*

(*a*) *At Common Law.*[1]

(*b*) *By Statute.*[2]

(B) *By being Repugnant.*[3]

"whereas A. will surrender a copyhold to B., if they so long live, then the obligation will be void:" it shall be part of the condition that A. make the surrender. 1 Roll. 409, l. 30.

So a condition, that "if A. discharge a recognisance, and whereas he has agreed to free the obligee from two bonds, the condition is that if he save him harmless from the said two bonds, then," &c., it extends to the recognisance as well as to the two bonds. 1 Roll. 409, l. 40. So a condition to perform all articles in the indenture does not extend to land excepted out of the lease, though it be mentioned in the indenture. Id. 431, l. 25. An entire condition is not apportionable by act of parties. *Knight's case*, 5 Rep. 546. *Twynam v. Pickard*, 2 B. & A. 105, 111. *See* 1 B. & Adol. 715.

[1] The condition must not be *malum in se* (*Carpenter v. Beer*, Comb. 246); but a condition in a bond to pay a pregnant woman a certain sum to save the putative father harmless is not immoral nor illegal. *Briggs v. Mond*, 1 Lutw. 250. A condition in a bond, operating in restraint of marriage, is void (*Lowe v. Peers*, 4 Burr. 2225; *see* id. 2052; 19 Ves. 1; 5 id. 117; 2 Stra. 1128); and the same rule applies to one given to procure a marriage. *Hall v. Potter*, 3 Lev. 411; 2 Bro. P. C. 144. A bond conditioned to commit maintenance is void (*see* Hob. 304; Hut. 40; 1 Roll. Abr. 427); or not to give evidence, is illegal. *Masen v. Watkins*, 2 Vent. 109. A condition in a bond, that the obligor shall remove himself and his family from a particular parish, and not return to live therein as an inhabitant without permission from the obligee, is legal (*Shelton v. Sire*, 11 Mod. Rep. 310); but a bond conditioned to render in execution a person who has already been discharged from execution for the same cause is void. *Da Costa v. Davis*, 1 B. & P. 242.

[2] If the condition in a bond be to do an act in contravention of any statute, it will be void. *See ante*, Bond; *post*, Contract.

[3] Being repugnant to the nature of the estate to which it is annexed, the condition is bad, as a feoffment in fee, upon condition that the feoffee shall not take the profits, is void, as being repugnant and against law, and the estate given is absolute. 1 Inst. 206. So, where a lease was made to A. B., and with a proviso that if C. should demand any profits of the lands, or enter into the same during the life of A. or B. (who were his father and mother), that then the estate limited to C. should cease, and be utterly void, it was resolved that this was a condition, and was void, being repugnant to the estate limited (see *Moor v. Savill*, 2 Leon. 132); but *Littleton* says, if the condition be such that the feoffee shall not alien to such a one, naming him, or to any of his heirs, which does not take away all power of alienation, then such condition is good (1 Inst. 223, a). Whatever is prohibited by law may be prohibited by a condition; therefore, if a feoffment be made in fee, upon condition that the feoffee shall not alien in mortmain, this is a good condition, because such alienation is prohibited by law. 1 Inst. 223, b. So, if lands be given in tail, on condition that neither the tenant in tail nor his heirs shall alien in fee or in tail, or for the term of another's life, but only for their own lives, such a condition is good, because these alienations are contrary to the statute De Donis, tit. 2, c. 2. Litt. s. 362. So, if a person make a gift in tail, upon condition that the donee shall not make a lease for three lives, or twenty-one years, according to the statute 32 Hen. 8, the condition is good; for this power being given collaterally is not incident to the estate, and may therefore be restrained by condition (*see* 1 Inst. 223, b); but if an estate be created, with a condition that the tenant in tail shall not suffer a common recovery, the condition is void, because the right to suffer a common recovery is an incident inseparably annexed to an estate tail. (Id.) *Lord Coke* (1 Inst. 206, b) says, although a condition repugnant to the nature of the estate granted is void, yet that in all such cases a bond, by which the obligor is restrained from doing that which the nature of the estate granted entitled him to do, will be good: thus, if a feoffee in fee becomes bound in a bond not to take the profits of the land, or not to alien the estate, such a bond would be good (2 Inst. 206, b); as where A. made a settlement of his lands on his son in tail, but took a bond from him not to sink the entail: on a bill to be relieved, it was ruled that the bond was good, and the bill dismissed with costs, though the alienation was made by the issue; for if the son had not agreed to give the bond, the father might have made him only tenant for life. *See* 2 Vern. 235. The preceding doctrine seems questionable, as it offers an obvious mode of restraining a person from exercising those rights over an estate which the common law gives him, —consequently, of frustrating the common law (*see* Moore, 810); as where A. settled lands on B. in tail, with remainder to his right heirs, and took a bond from B. not to commit waste, the bond being put in suit, it was directed to be delivered up to be cancelled, the court saying it was an idle bond. 2 Vern. 25. *See* Alienation, vol. i. p. 284, and 6 Scott, N. R. 522; 12 L. J. C. P. 265; 13 Mee. & W. 772.

Whether words in the condition of a bond which are repugnant to the plain intent of

(C) *By being Impossible.*[1]

(D) „ *Uncertain.*[2]

(E) *Of the Consequences of Void Conditions.*[3]

X. Of the Performance of Conditions.[4]

the parties will be rejected, seems questionable (*Prideaux v. Roberts*, 1 Com. 231); and where a bond dated in March conditioned for payment *super vicesimum octavum diem Martii proximum sequentem*, the court, on motion by the defendant in arrest of judgment, held it payable in the current month. *Lister v. Stanley*, 1 Mod. 112; 3 Keb. 291.

[1] A condition for the obligor to go to Rome the next day (Co. Litt. 206; Say. 96; Leon. 189; 14 E. 43), or that the obligor shall assign to the obligee a commission of bankruptcy, is an impossible condition, and therefore void. Roll. Abr. 419. But if a woman makes a feoffment to a man who is married to another, upon condition that he shall marry her, this is a good condition; for his wife may die, and then he may marry her. Bro. tit. Cond. 420. If the condition of a bond be duplex, the impossibility of performing one part is no justification of non-performance of the other. *Da Costa v. Davis*, 1 B. & P. 242.

[2] An uncertainty in the condition of a bond may be supplied. *Holmes v. Ivy*, 2 Show. 16.

[3] A defendant cannot take advantage of a void condition in a bond without pleading it (*Colton v. Goodridge*, 2 Bl. 1108); and if the condition be repugnant (*Wells v. Fergusson*, 11 Mod. 199; 2 Salk. 463) or impossible (*Wall v. Grovet*, 12 Mod. Rep. 418), the bond becomes single.

A void condition in a bond does not affect the wole bond. *Newman v. Newman*, 4 M. & S. 66. *Layng v. Paine*, Willes, 574.

[4] *By whom.*—It is a general principle that the person to be discharged is bound to do the act which is to effect his exoneration. *Cranley v. Hillary*, 2 M. & S. 120. Hence it is laid down by *Littleton* (s. 340), that the obligor of a bond, conditioned for the payment of money at a particular day, is bound to seek the obligee, if he be in England, and at the set day, to tender him the money, otherwise he shall forfeit the bond.

To whom.—In debt on bond conditioned to deliver forty pairs of shoes within a month at H. B. to H. K., a common carrier, to G. for the use of the obligee:—*Plea*, that in all that space of a month H. K. did not come to London, but that on such a day at H. B. he delivered forty pairs of shoes to A. G., the carrier's servant, is good. *Staples v. Alden*, 2 Mod. Rep. 309. So, if the condition of a bond be to pay 10*l.* &c., it is a good performance if he pays it to his deputy. 42 Ed. 3, 136; Roll. Abr. 421. So, if he be to pay 10*l.* per annum after the death of the obligee to the executors of the obligee for the use of his children, and he die without making any executors, the money shall be paid to his administrator. West, 115; Litt. Rep. 156. But if a man be bound to pay 20*l.*, upon condition to pay 10*l.* to such person as the obligee shall name by his last will, and the obligee does not name a person by his will, the obligor is not bound to pay it to his executors, because the condition has reference to his nomination. Roll. Abr. 421. There is a diversity where the condition is to pay 10*l.* to the assignee of the obligee, and where to the obligee or his assigns, for in the last case it vests as a duty in the obligee and shall go to his executors.

At what Time.—A condition to do within the space of one month such further act or acts as the obligee shall demand, and no demand is made within the month after the making of the obligation, yet the obligor is bound to do them within a month after request made, although a month has passed since the making of the obligation. *Wentworth v. Wentworth*, Sty. 242; Roll. Abr. 441. So, if the condition is to pay 50*l.* upon the 10th of January next on three months' warning, the obligor must pay the money upon the 10th of January next, giving the obligee three months' warning, for the words shall be taken most strongly against the obligor. If a condition be to do a single personal act, the obligor shall have the whole of his life to perform it (Co. Litt. 208–9); and shall not be bound to do it on request. (Id. 209, a.) And if a condition be to do a local thing to the feoffor or obligee himself, he has time during life, unless he be hastened by request, as if a feoffment or obligation be upon condition that he re-enfeoff the feoffor or obligee. Co. Litt. 208, b.; 1 Roll. 438; id. 15, 40; Co. Litt. 219, a, 220, a. So, if it be that if he re-enfeoff the feoffor and a stranger (id. 219, b), or re-grant to the feoffor in tail, remainder to a stranger. (Id.) So, if a devise be to A., upon condition that she marry B., time shall be allowed to A. to marry at any time during her life: *per Holt*, Skin. 320. So, if a devise be to A. upon condition that A. marry B. before her age of twenty-one years, and B. dies before such age, A. shall have the land till her age of twenty-one years. (Id.) But where a condition is to do a transitory thing without limiting any time, it ought to be done immediately, viz. in convenient time; as an obligation to pay money, to deliver charters, &c. Co. Litt. 208, a; 1 Roll. 436; id. 15–35.

At what Place.—If the condition of an obligation be to pay money to the obligee at a day certain without limiting any place, the obligor is to seek out the obligee if he be within the realm. Litt. s. 340. So, if a feoffment be upon such condition, for it is a sum in gross and collateral to the land. Litt. s. 340; 1 Roll. 445; id. 30, 40. So, if a condition be, that a stranger shall show a deed to his counsel upon request, and after request made the stranger ought to seek out his counsel. 1 Roll. 443; id. 35. But if a

XI. Of the Breach of Conditions.

(A) *What in general constitutes a Breach.*[1]

(B) *When a Notice is Necessary.*[2]

(C) „ *Request is Necessary.*[3]

(D) „ *Tender and Refusal are Necessary.*[4]

XII. Of Excusing the Non-Performance.[5]

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condition be to deliver, for instance, corn, timber, &c., the obligor before the day ought to inquire where the obligee will appoint the delivery. Co. Litt. 210, b.; 1 Lev. 46. If a condition be to pay rent, it is sufficient that it be tendered or paid upon the land. Co. Litt. 210, b.

What a sufficient Performance.—A condition to leave the obligee a third part of his estate, is not performed by the obligor making the obligee a joint-executor with two other persons. *Impey v. Pit*, 2 Show. 69; T. Jones, 133. For if a condition be to do a thing, the party ought to do all that which depends upon the performance (1 Roll. 422; id. 45); as if a condition be to stand to an award concerning a partition, if it awards a partition, and that he levy a fine for confirmation, he ought to levy the fine; for it depends upon the partition and enforces it. (Id. 433; id. 47). So he ought to perform it strictly, as if a condition be to enter a *retraxavit*, and he discontinues, it is not a performance. (Id. 426; id. 32). So, to appear at the suit of such a one in K. B., and he appears there the same term in another suit, though this be an appearance in law, it is not a performance. Id. i. 40.

A party cannot take advantage of the non-performance of a condition arising from his own neglect. *Bryant v. Beattie*, 4 Bing. N. S. 254.

[1] A bond to sue with effect is not forfeited by procuring an injunction. *Duke of Ormond v. Ireland*, 12 Mod. Rep. 320, 321. But a bond payable by instalments becomes forfeited by non-payment of the first instalment. *Webb v. Dwight*, 7 Mod. Rep. 191; 2 Mod. 285. A bond conditioned to pay when such a bill of costs should be stated by two attornies, indifferently to be chosen between the parties, is forfeited by one of the parties refusing to appoint an arbitrator. *Otway v. Holdips*, 2 Mod. Rep. 266.

[2] Notice of performance is necessary where there is a contingent condition. *Anon.* 7 Mod. Rep. 64. It must be given by the obligor on a bond payable three months after warning. *Lawson v. Widdrington*, 1 Lev. 85; 1 Keb. 380, 415.

[3] A request is requisite where there is no duty until demand. *Harwood v. Tuberville*, 6 Mod. Rep. 200. As on a condition to grant an annuity within six months after the death of A., or on his refusing so to do to pay 300*l.*, the obligee is bound to make a request of a deed of annuity within the time specified. *Basket v. Basket*, 2 Mod. 200; 1 id. 264; 1 Freem. 228. So if a master bind himself to do an act at a particular time if requested by his apprentice, he is not bound to do so unless a request be made. *Fitzhugh v. Dennington*, 6 Mod. 227, 259; 3 Salk. 309; 2 id. 585; Holt, 68; 2 Ld. Raym. 1094.

[4] On a condition to execute a deed, the defendant, to save the forfeiture, must tender the deed. *Baker v. Bulstrode*, 1 Mod. Rep. 104; 2 Lev. 95; 2 Danv. 39; 3 Keb. 273; 1 Vent. 255. So, under a condition to exhibit an inventory in the spiritual court before such a day, the defendant, in excuse, must not only plead that no court was held, but also that he was there ready. *The Archbishop of Canterbury v. Willis*, 1 Salk. 316. *See* 1 C. & M. 711.

[5] A condition rendered impossible by the act of God (*Thomas v. Howell*, 1 Salk. 170; 1679 C. B.; 1 Salk. 170) is an excuse for its non-performance, as if a ship be lost by stress of weather. *Pim v. Elliott*, Skin. 3. And when a condition is in the disjunctive, if one part of the condition becomes impossible by the act of God (*Laugher's case*, 5 Co. 21), the obligor is not bound to perform the other part. *Sparrow v. Sowgate*, W. Jones, 29: cited in *Weddall v. The Manucaptors of Jocar*, 10 Mod. Rep. 268. *Shippley v. Chappell*, 3 Mod. 233. The performance of a condition may be excused by an act of law, which is necessary and inevitable; as if a condition be that the feoffee pay so much out of the profits annually to charitable uses: if he dies, and his heir be in ward to the king, the payment shall be excused; for it ought to be out of the profits, which are transferred by act of law to the king. *See* 1 Roll. 451; Cro. Jac. 374; Roll. Rep. 198; 3 Bulst. 58. But if the condition be, that he shall be his attorney in all pleas, and he is made sheriff, that does not excuse him. *See* 1 Roll. 451.

The performance of a condition may likewise be excused by an act of the parties; as if the obligees neglect to comply with the condition, it is a discharge of the obligation. *Basset v. Basset*, 1 Mod. 264; Freem. 228. So, if the condition of a bond be that the obligor shall enfeoff the obligee of the land before such a day, and afterwards and before the day the obligee dispossess the obligor and keep it by force till after the day, so that the obligor cannot enter, this will excuse the performance of the condition. *See* 8 Co. 92; Co. Litt. 206. So, if a man be bound to build a house, &c., he is excused if the obligee will not suffer him to build it; for he cannot come on the land against his will. *See* Roll. Abr. 435; 9 Hen. 44; 3 Hen. 6, 37; Roll. Abr. 454.

The non-performance of a condition shall

XIII. Of the Remedies for Non-Performance.[1]

CONDITIONS of Sale. *See* Sale.

CONDONATION.[2] *See* Dissolution of Marriage; Judicial Separation.

CONFESSION and Avoidance. Pleas in must be specially pleaded.

Reg. Gen. H. T. 853, r. 8. "In every species of action on contract, all matters in confession and avoidance, including not only matters in discharge, but those which show the matter to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded: *exempli gratia*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded. *See* also rule 8. In actions of tort, by rule 17, "all matters in confession and avoidance shall be pleaded specially, as in actions on contract." *See post*, Contract, p. 193; Torts. *See* also General Issue; Pleading.

CONFESSION of Action. *See* Cognovit, *ante*, p. 128; Executor and Administrator.

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not be excused by the act of a stranger (*Butcher v. Vane*, 1 Lev. 191; 1 Sid. 313); as if the condition be to deliver goods, and a stranger intercepts them (1 Roll. 451); or that a man shall appear, and a stranger imprisons him (id.), it does not excuse the performance. So, if a condition be to do a thing to a stranger, who refuses to accept it (1 Roll. 452; *see* Litt. 13; 1 Roll. 457): as if the condition be that the son of the obligor shall marry the daughter of the obligee; if the daughter of the obligee refuse the son, yet the condition is forfeited, for the daughter is a mere stranger, and the obligor has taken on him that his son shall marry her. Hutt. 48; Hench. 30; 3 Bulst. 30; *see* 19 Hen. 6; Co. Litt. 209; 1 Leon. 266; 2 id. 222; Roll. Abr. 453; 5 B. & A. 917. But if A. disseises B., and after leases to C. for years, and C. covenants at the end of the term to leave and yield up the tenements well repaired to A., and after B. enters, &c., C. is excused. Cro. Eliz. 656; *see* 5 Co. 23; Cro. Eliz. 716; Moore, 645; Litt. Rep. 13; Hen. 26.

[1] A condition to a feoffment, &c., may give an entry generally, or a special entry, as, "till he be satisfied," &c. If a condition be that he shall enter and hold the land till he be satisfied, he shall have the land only in nature of a distress. Litt. s. 327. If a condition be that he shall have the land till he be thereof satisfied, or words which are tantamount, the profits shall be in part of satisfaction. Co. Litt. 203, a. But where a condition is, that he shall have the land till he be satisfied the rent be paid, without saying thereof, or to the same effect, the profits do not go in satisfaction, but shall be taken to his own use, as a penalty to enforce the payment. (Id.) If rent be granted with a condition, that if it be in arrear the grantee, his heirs and assigns, may enter and hold the land till satisfied by the profits, the assignees may enter and hold till satisfaction (1 Sand. 112); and the grant is good, though the deed be not enrolled; for this uncertain interest may attend a certain and fixed estate. Id.; 1 Sid. 344. So, if the grant be by deed, with a covenant to levy a fine, which is levied of the land accordingly, the assignee of the rent shall take advantage of the condition, which shall be transferred with the rent, though it was only a possibility. 2 Roll. 48, l. 45. But if a man purchases the manor of D., and has other land conveyed, as a collateral security, to the use of the vendor and his heirs, and till the purchase be evicted by his wife, and then to the use of the purchaser, his heirs and assigns, till satisfied the damage had by such eviction; if he assigns the manor of D., the assignee, being evicted, cannot enter into the land; for the use being contingent, was not assignable before it happened. 2 Roll. 40, j. 5, n. It is a general rule, that a party who enters for a condition broken shall be possessed of the same estate and interest as he was prior to the creation of the interest destroyed by the non-performance of the condition (Co. Litt. 202; Roll. Abr. 474); as if a feoffment is made to A., upon condition for the non-payment of certain rent to re-enter, and A. dies, leaving a wife, after which the condition is broken by the heir of A., the feoffor shall re-enter, and defeat the title of dower that accrued to the wife of the feoffee. 22 E. 19; Fitz. Conditions, 14; S. C. Roll. Abr. 474.

[2] *Condonation* means forgiveness and reconciliation. It is either express or implied. The remedy of divorce is *privati juris*. The public can neither institute nor instigate the proceedings. When the injury is deliberately and knowingly condoned by the party injured, there is an end to all claim of redress, unless there be a renewal of misconduct. Macqueen on Divorce, p. 48. See *Keats v. Keats*, id. 49. *Beeby v. Beeby*, 1 Hagg. Ecc. 793. *Durant v. Durant*, id. 745. *See post*, Dissolution of Marriage; Judicial Separation.

CONFESSION of Action in Ejectment.

See Ejectment.

CONFESSION of Error.

See Error.

CONFESSION of Judgment.

See Cognovit Actionem, *ante*, p. 128.

CONFESSION of Plea.

A plea containing a defence arising after the commencement of the action, or after the last pleading, may be confessed by the plaintiff.

Reg. Gen. (Pl.) H. T. 1853, r. 22. If a plea containing a defence arising *after the commencement of the action* be pleaded, the plaintiff may confess it, and will thereupon be entitled to the costs of the cause up to the time of the pleading of such plea." *See* 21 L. J. C. P. 226; 24 id. Ex. 47.

Rule 23. "When a plea is pleaded with an allegation that the matter of defence arose *after the last pleading*, the plaintiff shall be at liberty to confess it, and shall be entitled to the costs of the cause up to the time of pleading such plea. But this and the preceding rule shall not apply to the case of such plea by one or more only out of several defendants." *See* 22 L. J. Q. B. 30; 4 D. & L. 167.

CONFESSIONS of Guilt.

(A) *Are Receivable in Evidence against the Person who makes it.*[1]

[1] Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law; their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. *Warickshall's case*, 1 Leach, C. C. 263; 2 East, P. C. 658, S. C. *Lambe's case*, 2 Leach, C. C. 554–5. *Mortimer v. Mortimer*, 2 Hagg. Cons. R. 315. *Harris v. Harris*, 2 Hagg. E. C. R. 409; 1 Gilb. Ev. by Lofft. 216; Dig. lib. 42, tit. 2, De Confess.; Van Leeuwen's Com. c. xxi. s. 1; 2 Poth. on Obl. by Evans, App. Numb. xvi. s. 13; Tayl. Ev. s. 625. Such confessions, therefore, so made by a prisoner to any person, at any time and in any place, are at common law receivable in evidence (*Lambe's case*, 2 Leach, C. C. 554; M'Nally's Ev. 42, 47), while the degree of credit due to them must be estimated by the jury according to the particular circumstances of each case.

Confessions may be divided into two classes; namely, judicial and extra-judicial. Judicial are those which are made before the magistrate, or in court in the due course of legal proceeding; and it is essential that they be made of the free will of the party, and with full knowledge of the nature and consequences of the confession. Of this kind are the preliminary examinations, taken in writing by the magistrate, pursuant to statute, and the plea of guilty to an indictment made in open court. Either of these is sufficient by itself to support a conviction, though followed by a sentence of death, they both being deliberately and solemnly made under the protecting caution and oversight of the judge. Even on trials for treason or misprision of treason, where the law in its clemency affords to the accused unusual protection, a willing confession without violence, in open court, renders it unnecessary to call witnesses in support of the charge (7 Wm. 3, c. 3, s. 2; extended to Ireland by 1 & 2 Geo. 4, c. 24). *Gregg's case*, 14 How. *St. Tr.* 1375); and perhaps also, though this would seem highly questionable (*Berwick's case*, Foster, *Cr. Law*, 10; 18 How. *St. Tr.* 370, S. C. *R. v. Willis*, 15 id. 24, *per Ward*: C. B. 643; *per Eyre, S. G.*), a confession made during the solemnity of an examination before a magistrate or other person having authority to take it, will, if satisfactorily proved by two witnesses, be deemed sufficient evidence to warrant a conviction. Foster, *Cr. Law*, 240–3; Tayl. s. 626.

Extra-judicial confessions are those which are made by the party elsewhere than before a magistrate or in court; this term embracing not only express confessions of crime, but all those admissions and acts of the accused from which guilt may be implied. All voluntary confessions of this kind are receivable in evidence, on being proved like other facts, and this too on trials for treason, or misprision of treason, in like manner as on ordinary indictments, except only that on these more serious occasions they will not supply the want of the two witnesses whose testimony is required by the act of Wm. 3. Consequently, whether these confessions be proved by one witness or two, they can only be treated as corroborative evidence of the overt act charged (*R. v. Willis*, 15 How. *St. Tr.* 623–5; Foster, *Cr. Law*, 240–3 (*R. v. Crossfield*, 26 How. *St. Tr.* 55–7); unless such overt act be the assassination of the Queen, or any attempt to injure her person, in which event the accused may be convicted on the same evidence as an ordinary murderer. 39 & 40 Geo. 3, c. 93; 1 & 2 Geo. 4, c. 24, s. 2; 5 & 6 Vic. c. 51 s. 1; Tayl. Ev. 626.

The whole of what the prisoner said on the subject at the time of making the confession should be taken together. The prisoner is supposed to have stated a proposition respecting his own connexion with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or in any particular number of sentences, excluding all other parts of the con-

(B) *The Confession must be Voluntary.*[1]

versation. Tay. Ev. 626.

As the meaning of a writing must, in civil cases, be collected from the whole taken together, and as when several instruments relating to the same matter have been executed at one time, they are all equally resorted to for the purpose of ascertaining the intention of the parties; so here, if one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the court the whole of what was said in that conversation, or at least so much as is explanatory of the part already proved against him, and, perhaps, also, *in favorem vitæ*, all that was relative to the subject matter in issue: *per Abbott, C.J.* in the Queen's case, 2 B. & B. 297–8. See *Prince v. Samo*, 7 Ad. & E. 634–5. *R. v. Jones*, 2 C. & P. 629. *R. v. Higgins*, id. But if the prosecutor can contradict any part of it, he is at liberty to do so, and then the whole testimony is left to the jury for their consideration. *R. v. Jones*, id. 629. Even without such contradiction, the jury may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. *R. v. Higgins, supra: per Park, J. R. v. Steptoe*, 4 C. & P. 397: *per id. Resp. v. M'Carty*, 2 Dall. 86–8.

If the confession implicates other persons by name, still it must be proved as it was made, not omitting the names; but the judge will instruct the jury, that is not evidence against any but the prisoner who made it. *R. v. Hearne*, 4 C. & P. 215: *per Littledale, J. R. v. Clewes*, id. 221–5: *per id. R. v. Fletcher*, id. 250, *per id.*: Kew. C. C. 107, S. C. *R. v. Hall*, 1 Lewin, C. C. 110: *per Alderson, B. R. v. Foster*, id.: *per Lord Denman. R. v. Walkley*, 6 C. & P. 175: *per Gurney*, B. See *Barstow's case*, 1 Lewin, C. C. 110.

[1] It is necessary, in order that a confession should be receivable in evidence against the party who made it, that it should be voluntary.

The question, whether the confession has been obtained by the influence of hope or fear (being in its nature preliminary), is for the judge, who admits or rejects the proof of the confession, as he may or may not find it to have been drawn from the prisoner by the application of these motives. In determining this question much necessarily depends on the age, experience, intelligence, and character of the prisoner, and the circumstances under which the confession was made. M'Nally's Ev. 43. *Nute's case*, 6 Petersdorff's Abr. 82. *Knapp's case*, 10 Pick. 496.

A confession the day after an inducement has been offered is voluntary; and therefore admissible against the prisoner. *Rex v. Richards*, 5 C. & P. 318. And a confession in answer to questions put by a magistrate without threat or promise is evidence. *Rex v. Ellis*, 1 R. & M. 432. And where a promise has been made, but afterwards withdrawn, a subsequent confession is admissible. *Rex v. Clewes*, 4 C. & P. 221. To exclude confessions, the inducement must be made or sanctioned by a party having some authority. *Rex v. Taylor*, 8 id. 733. Where the prisoner made a confession to a magistrate, after the persuasions of a clergyman, but not with any view of temporal benefit, and after caution that it would be probably given in evidence against him. *Gilham's case*, 1 Moo. C. C. 186. Or where a prisoner handcuffed, saying (after a recommendation to confess, in the absence of the prosecutor, and that they would do all they could for him) that if the handcuffs were taken off he would show where all the property was:—*Held* admissible. *Rex v. Green*, 6 C. & P. 655. So where, after promises held out by persons not examined, the magistrate told the prisoner that his confession would do him no good; and he afterwards made a statement, which was taken down:—*Held*, that it was not to be considered as made under the former influence, and was admissible. *Rex v. Howes*, 6 id. 404. And where parties in custody at the time of the inquest in a case of murder, were examined by the coroner on oath without inducement, and expressing their wish to be examined, their depositions are evidence. *Reg. v. Owen and others*, 9 id. 83. So, a statement made before the magistrate at the first hearing, although not taken down, and on the final one the prisoner had declined saying anything:—*Held*, receivable in evidence, and not to be excluded by reason of the magistrate's neglect in not returning what had been said. *Rex v. Wilkinson*, 8 id. 662. And where it appeared that, before a statement made by a prisoner before the magistrate, he was sworn by mistake, but as soon as it was discovered the deposition was destroyed, and the party cautioned:—*Held*, that his subsequent statement was receivable. *Rex v. Webb*, 4 id. 564. So, where the constable who had charge of the prisoner left the room, and shortly after the constable, to whom the prisoner made the statement, entered, the judge refused to receive the statement without calling the other constable to negative any promise or threat, as otherwise it might lead to collusion by constables; but it appearing that the prisoner was not under charge at the time, but detained only as an unwilling witness, the court received the statement without previously calling the other constable. *Rex v. Swatkins*, 4 id. 548. And where the prosecutor, before the magistrate on a charge of forgery, said he considered the prisoner as only the tool of another, and the magistrate told the prisoner to be sure to tell the truth:—*Held*, that the statement then made was receivable. *Rex v. Court*, 7 id. 486. But where the prisoner, whilst unsuspected, had been examined as a witness on oath, and therein

(C) *Effect of Confession.*[1]

referred to a letter then produced:—*Held*, that as the examination not being perfectly voluntary could not be produced against the prisoner when charged with the offence, nothing said as to such letter before the magistrate could be received; neither would the judge (*Gurney, B.*) receive evidence of what was said but not taken down, nor parol evidence of the contents of such examination. *Rex v. Lewis*, 6 C. & P. 161. *Rex v. Davis*, id. 178. And the prisoner's statement reduced into writing, before the witnesses against him had been examined, admitted *per Garrow, B.*, with great doubt of its legality. *Rex v. Fagg*, 4 id. 566. But, where before the prisoner's examination was taken, he was told not to say anything to prejudice himself, as it would be used for or against him:—*Held* (*per Coleridge, J.*) that the examination was inadmissible. *Reg. v. Drew*, 8 id. 140.

There is a difference of opinion amongst the judges as to receiving evidence of confession where an inducement has been held out by persons having authority, and where by persons having none. *Rex v. Spencer*, 7 C. & P. 776. Where a promise or threat has been held out, the effect is always to exclude a confession or statement made to the person so holding out the promise or threat (*Rex v. Dunn*, 4 id. 543), unless the usual caution has been given to the prisoner by advising him to make no disclosure. *Rex v. Green*, 5 id. 312. After a threat by the captain of a ship to a prisoner, a mariner on board, upon the stolen property being found, that "if he did not tell him who was his partner he would commit him to prison as soon as he got to N." (*Rex v. Parratt*, 4 id. 570); or where a surgeon called in to attend on a case of poisoning told the prisoner she was suspected, and had better disclose what she knew (*Rex v. Kingston*, id. 387); or where the constable had said to the prisoner, "You had better not add a lie to the crime of theft," and then desired him to go with another constable and show where he had put the things (*Rex v. Shepherd*, 7 id. 579); or where it was said to the prisoner, "It would have been better if you had told at first" (*Rex v. Thomas*, 6 id. 353); or a confession, after being told by the constable, "It is of no use for you to deny it, for there are A. and B., who will swear they saw you do it." Such statements render the confessions inadmissible. *Rex v. Mills*, 6 id. 146. So, where the witness said, "You had better split than suffer for all" (*Rex v. Thomas*, id. 353); or where the prosecutor said to the prisoner, "If you will not tell us what you know about it, we, of course, can do nothing:"—*Held*, inadmissible. *Rex v. Partridge*, 7 id. 551.

So where the confession was obtained from the prisoner, a girl fifteen years old, through the promises and threats of relatives or servants of the prosecutor:—*Held*, improperly received, and the conviction bad. *Rex v. Simpson*, 1 R. & M. C. C. 465. But where a constable had only said, "If you will tell where the property is you shall see your wife; and I hope you will tell, as Mrs. G. (the prosecutrix) can ill afford to lose the money" (*Rex v. Lloyd*, 6 C. & P. 393); or where, whilst the party was in custody, another prisoner said to him, "Pray, split; I wish you would tell me how, &c;" upon which, at the prisouer's request, he took an oath not to disclose what he should say:—*Held*, that the confession was inadmissible. *Rex v. Shaw*, id. 372. And where the prisoner, under fourteen years of age, was solemnly questioned and pressed by a party not connected, nor a constable:—*Held*, that the statements were strictly admissible, but the mode of obtaining them strongly disapproved. *Rex v. Wild*, 1 R. & M. C. C. 452.

The rule excluding confessions obtained under a promise or threat will prevail, though the inducement was not actually offered by the person in authority, if it were held out by any one in his presence, and he by his silence had sanctioned its being made. *R. v. Laugher*, 2 C. & Kir. 225. *R. v. Pountney*, 7 C. & P. 302. *R. v. Taylor*, 8 id. 734.

[1] The principal's confession is not evidence against the accessory. *Rex v. Turner*, 1 Moo. C. C. 347. But what was said to the prisoner's wife by the prisoner, whilst in custody, is evidence against the husband. *Rex v. Bartlett*, N. P.; 7 C. & P. 832.

A confession can only affect the person by whom it is made (*The King v. Hevy & others*, 1 Leach, C. C. 232), and cannot be received to supply defective evidence. *The King v. Mosey*, id. 262, n. Where what the prisoner has stated is shut out on account of the manner in which it has been obtained, it does not prevent the admissibility of facts discovered in consequence of the statement. *Reg. v. Gould*, N. P.; 9 C. & P. 364.

The confession may be proved by parol evidence, though written down before the justice. *Rex v. Harris*, Moo. C. C. 338. But it ought to be proved in the language of the prisoner. *Rex v. Sexters*, cited Chit. Sup. to Burn's Jus. 103. Where the prisoner's statement had been made in answer to questions put by the magistrate, and been read over to him and acknowledged correct in substance;—*Held* sufficiently proved by the witnesses who deposed to the signatures of the magistrate and the prisoner, without calling the magistrate or his clerk. *Rex v. Rees*, 7 C. & P. 568. *Rex v. Reading*, id. 649.

Where a party charged with murder made a statement before the coroner, which purported to have been taken on oath:—*Held*, not receivable against him, and that parol evidence was inadmissible to show that it was not made on oath. *Reg. v. Wheeley*, 8 C. & P. 250. Where no person was present at the time to contradict the prosecutor's

CONFINEMENT, Solitary.

By a clause in each of the Criminal Law Consolidation Acts of 1861, "whenever solitary confinement may be awarded for any indictable offence under any of the acts, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year."

CONFISCATION. *See* Prize; Ships and Shipping.

CONIES. *See* Game; Rabbits.

CONJUGAL RIGHTS, Restitution of.

Petition for Restitution of Conjugal Rights.

Petition for restitution of conjugal rights.[1]

By 20 & 21 Vic. c. 85, s. 17, "application for the restitution of conjugal rights (or for judicial separation on any one of the grounds aforesaid) may be made by either husband or wife, by petition, to the court, or to any judge of assize at the assizes for the county in which the husband and wife reside, or last resided together, and which judge of assize is hereby authorised and required to hear and determine such petition according to the rules and regulations which shall be made under the authority of this Act, and the court or judge to which such petition is addressed, upon being satisfied of the truth of the allegations

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statement, the prisoner was allowed to make his statement before his counsel addressed the jury. *Reg. v. Malings*, 8 C. & P. 242. But *Gurney, B.*, though he allowed that course, thought it ought not to be drawn into a precedent. *Reg. v. Walkling*, id. 243. Where the only evidence against a party charged with murder was by his own confession, which admitted that he was present at the time, but took no part in the transaction: —*Held*, that the whole was evidence for the prisoner, but that the jury might disbelieve any part. *Rex v. Clewes*, 4 id. 221.

Where the statement is returned with the deposition the prisoner is not entitled to a copy thereof, under 6 & 7 Wm. 4, c. 114; but only of the depositions of witnesses. *Reg. v. Aylett*, 8 C. & P. 669.

It has been doubted whether extra-judicial confessions, uncorroborated by any other proof of the *corpus delicti*, are of themselves sufficient to justify a conviction of the prisoner. In each of the cases usually cited in favour of the sufficiency of this evidence there was some corroborating circumstance. See *Eldridge's case*, R. & R. 440. *Falkner v. Bond*, id. 481. *White's case*, id. 508. *Tibbet's case*, id. 509. *Stone's case*, Dyer, 215, pl. 50. But see *Wheeling's case*, which is in these words:—"But in the case of John Wheeling, tried before Lord Kenyon, at the summer assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his confession, when proved by legal testimony, though it is totally uncorroborated by any other evidence." 1 Leach, C. C. 311.

[1] A suit for the restitution of conjugal rights cannot be sustained by a wife who has committed adultery, although the husband also has committed adultery; for the doctrine of the canon law, that where husband and wife have both been guilty of adultery, there is *compensatio criminum*, and both are restored to the position of innocent parties, forms no part of the law of England. *Hope v. Hope*, 27 L. J. Prob. & M. 43.

There is a difficulty in enforcing the decree. The act provides that "the decrees of the Divorce Court shall be put in execution in the same or the like manner as the decrees of the Court of Chancery." 20 & 21 Vic. c. 85, s. 52. In *Cherry v. Cherry* (Macqueen on Divorce, 312) the court had granted a decree for the restitution of conjugal rights on the prayer of the husband. The decree was personally served upon the wife, and was disobeyed. She was then ordered to return to cohabitation within a specified time: this order was also personally served and disobeyed. A writ of attachment was granted against the respondent, and directed to the sheriff of Middlesex, who returned *Non est inventa*. A motion was then made for a writ of sequestration against the property of the respondent, who was entitled to a sum of 8000*l.* for her separate use, under a marriage settlement. The petitioner alleged that he did not wish to put the money into his own pocket, but to prevent her from having the benefit of it until she obeyed the order of the court, and returned to cohabitation. *Sir C. Cresswell* granted a writ of sequestration, and directed inquiry to be made as to the persons who ought to be appointed sequestrators according to the practice of the Court of Chancery. It seems that a party who disobeys the decree will be in contempt. *Barlee v. Barlee*, 1 Add. 301.

therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights (or judicial separation) accordingly; and where the application is by the wife, may make any order for alimony which shall be deemed just: Provided always, that any judge of assize to whom any such petition may be presented, may refer the same to any of her Majesty's counsel or serjeants-at-law named in the commission of assize or *nisi prius;* and such counsel or serjeants shall, for the purpose of deciding upon the matters of such petition, have all the powers that any such judge would have had by virtue of this act or otherwise."

CONNIVANCE. *See* Judical Separation.

CONSANGUINITY. *See* Descent.

CONSENSUS non Concubitus facit Matrimonium. *Consent, and not Cohabitation, constitutes Marriage.*[1]

CONSENSUS tollit Errorem. *Acquiescence is a waiver of an Error which might otherwise have been taken advantage of.* *See* Error; Pleading; Waiver.

CONSEQUENTIAL Damages. *See* Damages.

CONSIDERATION. *See* Bills and Notes, vol. ii. p. 400; Bond, id. p. 504; *post,* Contracts; Deeds; Guarantees, &c.

(A) *Distinction between Good and Valuable.*[2]

[1] "This," says Sir W. Blackstone (1 Com. 434), "is the maxim of the civil law in this case, and it is adopted by the common lawyers, who, indeed, have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws." By the ecclesiastical law marriage was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance. *Rex v. Millis,* 10 Clark & Fin. 719: *per Lord Brougham.* Marriage, therefore, is constituted by the present consent of the parties, expressed under such circumstances as by law required (*see* Marriage); so that though the parties after consent so given should, by death or disagreement, or any other cause, happen not to consummate the marriage, *conjunctione corporum,* they are nevertheless entitled to all the legal rights consequent on marriage. Broom's *Max.* 379. See *Catherwood v. Caslon,* 13 Mee. & W. 261. *Catterall v. Catterall,* 11 Jur. 914.

[2] Considerations, as they relate to deeds, are in general divided into good and bad considerations. "A good consideration," says Blackstone (2 Bl. Com. 297; see *Gully v. Bishop of Exeter,* 10 B. & C. 606) "is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation — being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is, therefore, founded on motives of justice."

A deed made in consideration of natural love and affection only is not necessarily void, although it may be made so by evidence. But if no fraud be shown, and if a consideration be in fact given, the deed is good, and that consideration may be proved *aliunde. Per Abinger, L. C. B.: Gale v. Williamson,* 8 Mee. & W. 405, 409. A deed made on a valuable consideration cannot in general be impeached. 2 Bl. Com. 444.

The distinction between a good and valuable consideration is this — that a good consideration makes the instrument good as between the parties; but a valuable consideration makes it good as against a subsequent purchaser. *Per Tenderden, C. J.,* in *Gully v. Bishop of Exeter,* 10 B. & C. 606.

The term "good consideration," thus applied with reference to deeds, does not apply to simple contracts.

Mere relationship, or natural love or affection, is not a sufficient consideration to support a simple contract. *See* note to *Wennall v. Adney,* 3 B. & P. 247, 251. *See* 11 Ad. & E. 447.

Valuable considerations are divided by the civilians into four species:—"*Do ut des;* as, when I give money or goods on contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond or promise of repayment, and all sales of goods in which there is either an express contract to pay so much for them; or else the law implies a contract to pay so much for them, or else the law implies a contract to pay so much as they are worth. 2nd. The second species is *facio ut facias:* as, when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on

CONSISTORY COURT. An ecclesiastical court held in the several cathedrals for the trial of all ecclesiastical causes arising within the several dioceses. The chancellor of the diocese, or his commissary, is the judge, and from his sentence an appeal lies to the archbishop of each province respectively. *See* 3 Steph. Com. 424. *See*, as to the local limits of the bishop's jurisdiction, 6 & 7 Wm. 4, c. 77; 10 & 11 Vic. c. 98; 20 Vic. c. 10. *Phelps v. St. John*, 10 Ex. 895. *Powell v. Hibbert*, 15 Q. B. 129.

CONSOLIDATING ACTIONS.[1]

I. Of Ejectment. *See* Ejectment.

II. On Policies of Insurance. *See* Insurance.

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both sides. Or it may be to forbear on one side on consideration of something done on the other; as, that in consideration the tenant will repair his house, B. (the landlord) will not sue him for waste. Or it may be for mutual forbearance on both sides; as, that in consideration that A. will not trade to Lisbon, B. will not trade to Marseilles, so as to avoid interfering with each other. 3rd. The third species of consideration is *facio ut des;* when a man agrees to perform anything for a price, either specially mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for certain wages, or an agreed sum of money, here the servant contracts to do his master's service in order to earn that specific sum. Otherwise if he be hired generally, for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4th. The fourth species is *do ut facias*, which is the direct counterpart of the preceding. As, when I agree with a servant to give him such wages upon his performing such work, which we see is nothing else but the last species inverted, for *servus facit ut herus det*, and *herus dat ut servus faciat*." 2 Bl. Com. 444.

A good consideration may arise either, 1st. by reason of a benefit resulting to the party promising, or to a third person by the act of the promisee; or, 2dly. by the reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation, however small the benefit, charge, or inconvenience may be, provided such act be performed, or such inconvenience or charge incurred with the consent, express or implied, of the promiser, or, in the language of pleading, at his special instance and request. *See* 2 Wms. Saund. 137, h; Selw. N. P. 46; Com. Dig. Action upon the case upon Assumpsit, (B.) 1: *per Yates, J.*, in *Pillans v. Mierop*, 3 Burr. 1673: *per Lord Ellenborough*, in *Bunn v. Guy*, 4 East, 193; and in *Jones v. Ashburnham*, id. 463–4: *per Best, C. J., Morley v. Boothby*, 3 Bing. 112–13: *per Tindal, C. J.; Willatts v. Kennerday*, 8 Bing. 10.

[1] Where several actions are brought by the same plaintiff against the same defendant, on causes of action substantially the same, the court will, on application, stay the proceedings in all but one, especially if the proceedings are oppressive or vexatious. *Jones v. Pritchard*, 6 D. & L. 529. *Haigh v. Paris*, 16 Mee. & W. 144. If the other actions are in a different court, the court will stay all proceedings until those other actions are abandoned. *Miles v. Bristol*, 3 B. & Adol. 945. If all in the same court, the actions will be consolidated. *Ward v. Pomfret*, 1 Man. & G. 559; 1 Scott, N. R. 483. Thus, where several actions were brought on several guarantees securing one debt, and the defence was the same in all, the court made an order for their consolidation. *Sharp v. Lethbridge*, 4 Man. & G. 37; 4 Scott, N. R. 722. Where, however, the defendants are different, it is not enough that one action will decide all the others (*Corporation of Saltash v. Jackman*, 1 D. & L. 851. *Henry v. Nash*, 1 Ex. 826. *Newton v. Belcher*, 9 Q. B. 612. *Giles v. Tooth*, 3 C. B. 665); and so where the plaintiffs are different. *Nicholls v. Lefevre*, 3 Dowl. 135. *Westbrook v. Australian &c. Company*, 14 C. B. 113.

If an action be brought on a bill, and another becomes due, and separate actions are brought, they will become consolidated. *Oldenham v. Tregwell*, 3 C. & P. 58. So, if two actions be brought for trespass on the same premises at two different times (*Anon.* cited Chit. Rep. 70 note), and three declarations against different persons for the same assault were consolidated (*Harper v. Woodhouse*, Prac. Reg. 151. *Catlin v. Elliott*, Barnes, 341); though in a similar, but anterior case, the application was refused. *Bayley v. Raby*, 1 Stra. 420. So, separate actions against husband and wife, and husband alone, cannot, it is said, be consolidated. *Swithin v. Vincent*, 2 Wils. 227.

Where the actions are brought under a statute, the court may have a power to stay proceedings in all but one action. *Ward v. Pomfret*, 1 Scott, N. R. 403. The rule is considered to be for the benefit of the defendant (*Macgregor v. Horsfall*, 3 Mee. & W. 320), and terms are generally imposed on him. *Doyle v. Douglas*, 4 B. & Adol. 545. *See* a form of consolidation rule in *Hollingsworth v. Brodrick*, 4 Ad. & E. 649. Sometimes the court will open the rule for the defendant, and allow a second action to be tried on terms. *Cohen v. Bulkeley*, 5 Taunt.

CONSPIRACY.

(A) *What Amounts to a Conspiracy*, p. 179.
(B) *Of the Indictment*, p. 180.
(C) *Of the Evidence*, p. 181.
(D) *Punishment*, p. 181.

(A) *What Amounts to a Conspiracy.*[1]

REX v. HOLLINGBERRY, 4 B. & C. 329; 6 D. & R. 345.

Conspiring to indict for the purpose of extorting money is a misdemeanor, whether the charge be true or false.

The defendants being indicted for conspiring falsely to indict Josiah Taylor, with intent to extort money, were found guilty of conspiring to indict with that intent, but not of falsely conspiring, &c., as laid. On motion in arrest of judgment,—

Per Cur. "This was an indictment for conspiring falsely to indict Taylor for the purpose of extorting money from him. The jury found the parties guilty

165. *Foster v. Allenby*, 3 Bing. N. C. 892, 896; 5 Dowl. 619. But newly-discovered evidence seems to afford no ground for such an application (*Pullen v. Parry*, 1 Chit. R. 709); but the court have set aside such rule on account of the absence of a material witness. *Holman v.* ——, 1 Chit. R. 710, n. Where the defendant obtains the verdict, the plaintiff, however, has not been restrained from trying a second action included in the rule merely because the costs of the first were not paid; though if he does so, he thereby forfeits the benefit of any terms imposed on the defendant. (Id.) When the rule binds the defendant to abide by the event of the action, this includes proceedings in error, though if error is brought he may be required to give security to abide by the decision in error. *Hodson v. Richardson*, 3 Burr. 1477. *Gill v. Hindley*, 1 Moore, 79. *Alwyne v. Favine*, 2 W. R. 430. Where several actions against different defendants were consolidated, and they were bound to abide the event of one of them, this has been construed to be a joint undertaking to pay the attorney's costs of that action. *Anderson v. Boynton*, 19 L. J. Q. B. 42.

The application is made either to a judge at chambers or the court, and one rule or summons only is necessary, intituled in the various causes. *Ward v. Pomfret*, 1 Scott, N. R. 410, n.; 1 Man. & G. 559. It seems the application may be made any time after appearance (*Hollingsworth v. Brodrick*, 4 Ad. & E. 646; 6 Nev. & M. 240), and even has been allowed after notice of trial given. (Id.) *Booth v. Payne*, 1 Dowl. N. S. 348. After judgment is signed by the plaintiff in the action tried, he obtains an order from a judge at chambers for leave to enter upon judgment and tax costs on the other actions, and issue execution in terms of the rule.

"Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court." Reg. Gen. (Pr.) H. T. 1853, r. 13.

[1] A conspiracy is a consultation and agreement between two or more persons, either falsely to charge another with a crime punishable by law, or wrongfully to injure or prejudice a third person, or any body of men, in any other manner; or to commit any punishable offence by law; or to do any act with intent to pervert the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means; and by 33 Edw. 1, s. 2, conspirators are thus defined: "Conspirators be they that do confederate or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict or cause to indict, or falsely to move or maintain pleas, and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved, and such as retain men in the country with licenses or fees to maintain their malicious enterprises, and this extendeth as well to the takers as to the givers; and stewards and bailiffs of great lords, which by their seignory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves." From this definition of conspirators it seems clearly to follow, that not only those who actually cause an innocent man to be indicted, and to be tried upon the indictment and lawfully acquitted, are properly conspirators; but persons are also guilty of this offence who basely conspire to indict a man falsely and maliciously, whether they do any act in furtherance of such conspiracy or not: for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be or be not any prosecution. 1 Hawk. P. C. c. 72, s. 2. But, in 1 Hawk. P. C. c. 72, s. 2, it is said, that, since it does not appear to have been solemnly resolved that persons offend-

of conspiring to indict Taylor for the purpose of extorting money. Now, in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as makes an indictable offence. The finding of the jury proves the defendants guilty of conspiring to make a charge in order to extort, which is in itself a misdemeanor, whether the charge be true or false. Besides, the third count is not open to this objection, for it charges the defendants with conspiring to indict, and not *falsely* conspiring to indict; and the rule is, that on a motion in arrest of judgment, if one charge is made out in any part of any one count so as to constitute a crime, that will suffice to support the indictment without proving the whole count."

(B) *Relative to the Indictment.*[1]

ing by a false and malicious accusation against another are indictable upon this statute, it seems to be safer and more advisable to frame an indictment for such an offence upon the common law than upon the statute.

If brokers agree together before a sale by auction that one only of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again among themselves at a fair price, and the difference between the auction price and the fair price divided among them, this is a conspiracy for which they are indictable. *Levi v. Levi*, 6 C. & P. 239.

Conspiracy to defraud is an indictable offence; as where three persons agreed that one should accept a fictitious bill, and that the others should indorse and negotiate it. *Rex v. Hevey and others*, 1 Leach, C. L. 232. So, where certain persons conspired to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. *Rex v. Roberts*, 1 Camp. 399.

An indictment for a conspiracy to fabricate and sell as good shares in a joint-stock company may be sustained, although such company may not be well constituted; but, *semble*, mere script receipts cannot be deemed shares, although they may be converted into such. *Rex v. Mott*, 2 C. & P. 521.

An indictment at common law will lie for conspiring to take away a woman from her parents, and then seducing her. *Rex v. Lord Grey*, 3 *St. Trials*, 519; S. C. 1 East, P. C. 460.

Persons coming to a theatre with a predetermined purpose of interrupting the performance may be indicted for a conspiracy. *Clifford v. Brandon*, 2 Camp. 358.

Unless unlawful means be used, conspiring to effect a marriage between paupers to exonerate the parish, is not illegal. *Rex v. Seward*, 3 Nev. & M. 557. In a prior case, it was holden that a contrivance to procure the solemnisation of a marriage amounted to a conspiracy. *The King v. Robinson and Taylor*, 1 Leach, C. C. 37; 2 East, P. C. 1010.

A bare contrivance to commit a civil trespass is not an indictable offence. *Rex v. Turner*, 13 East, 228. Diverting the cause of justice, by procuring a false certificate from a magistrate, is a conspiracy. *Rex v. Mawbey*, 6 T. R. 619. So, where persons charged a man with being a robber merely for the purpose of obtaining a reward for his apprehension, it was holden a conspiracy *Rex v. M'Daniel*, 1 Leach, C. L. 44.

Contriving to raise the price of the public funds on a particular day by false rumours is a conspiracy. *Rex v. De Berenger*, 3 M. & S. 67. Administering an oath, binding the party not to disclose the secrets of the association into which the party, at the time of the taking the oath, was admitted:—*Held* to be an offence within the 37 Geo. 3, c. 123, and that the enacting part of that statute was not controlled by the preamble; held, also, that the oath was not required to be of a formal nature, if intended to operate as such, and was so understood by the party taking it (*Rex v. Loveless & others*, 1885, N. P.; 1 M. & Rob. 349; 6 C. & P. 596; and see *Rex v. Brodribb*, 10 C. & P. 511, n.); as an oath to keep all the secrets of a trades union. *Rex v. Ball*, N. P. 6, id. 563. *Rex v. Dixon*, id. 601.

Where two conspire, and one dies, the other may still be indicted for the conspiracy (*Rex v. Nicols*, 13 East, 412, n.; S. C. 2 Stra. 1227); but one person alone cannot be guilty of this offence: therefore, if all the defendants who are prosecuted for such conspiracy be acquitted but one, the acquittal of the rest is an acquittal of that one also (*See* 1 Hawk. P. C. 572; 3 Burr. 1262; 12 Mod. 262); yet where one is convicted, he may be sentenced before the others are tried (*Rex v. Cooke*, 5 B. & C. 538); and it has been holden that such a prosecution is not maintainable against a husband and wife only, because they are esteemed but as one person in law. *See* 1 Hawk. P. C. 672.

[1] The venue ought to be laid in the county where the combination took place, and not where the object was carried into execution (*Reg. v. Best*, 1 Salk. 174; 2 Ld. Raym. 1167); but there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, may not be tried wherever one distinct overt act of conspiracy is committed. *Rex v. Brisac & Scott*, 4 East, 164. The court refused to change the venue on an indictment for a conspiracy to destroy foxes, &c., on the ground that the gentry of the county were fox-hunters. *Rex v. King*, 2 Chit. Rep. 217; at all events, it cannot be changed before issue joined. *Rex v. Forbes*, 2 Dowl. P. C. 440.

(C) *Relative to the Evidence.*[1]

(D) *Punishment.*[2]

CONSPIRACY to Raise Rate of Wages. *See* Strikes.

CONSPIRING to Murder.

By 24 & 25 Vic. c. 100, s. 4, "all persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any

An indictment for conspiring to defraud need not state the names of the parties intended to be defrauded. *Reg. v. Peck*, 1 Per. & D. 508. An indictment for a conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained is too general, and bad in point of law. *Rex v. Richardson*, 1 M. & Rob. 402. So, a count in an indictment for a conspiracy to cheat and defraud "the just and lawful creditors" of the party:—*Held*, bad, as too general: held, also, that an agreement entered into by the party was admissible in evidence to show the fraud intended, or other crime, although not stamped. *Rex v. Fowle*, 4 C. & P. 592.

Justices of the peace, at their sessions, may try indictments for a conspiracy. *Rex v. Rispal*, 3 Burr. 1320; 1 Black. 368. *Rex v. Edwards*, 8 Mod. 321.

[1] A conspiracy may be proved by antecedent acts of parties, and that the party charged adopted those acts. *Reg. v. Frost*, 9 C. & P. 150. A. was charged with having conspired with W. J. and others unknown to raise insurrections and obstruct the laws. It was proved that A. and W. J. were members of a Chartist lodge, and that A. and W. J. were at the house of the latter on a certain day, on the evening of which A. directed people assembled at the house of W. J. to go to the race-course at P., whither W. J. and other persons had gone:—*Held*, that, on the trial of A., evidence was receivable that W. J. had, at an earlier part of the same day, directed other persons to go to the race-course; and it being proved that W. J. and an armed party of the persons assembled went from the New Inn, it was held, that evidence might be given of what W. J. said at the New Inn, it being all one transaction. *Reg. v. Shellard*, 9 C. & P. 277. On an indictment for conspiring to excite seditious meetings, and for the purpose of exciting alarm amongst the Queen's subjects:—*Held*, that the evidence of a constable of complaints being made to him by persons of their alarm was receivable without calling those persons. *Reg. v. Frost & others*, id. 275. An indictment for conspiring, &c., "to prevent the workmen of J. G. from continuing to work, &c." is supported by evidence of a conspiracy to prevent any from continuing, &c. *Patteson: Rex v. Bykerdike*, M. & Rob. 179. A combination of workmen for the purpose of dictating to masters whom they shall employ, is indictable. (Id.) So, an indictment charging a conspiracy to oppress, &c., J. G., agent for a certain colliery, and to prevent the workmen of J. G. from continuing to work in the said colliery:—*Held*, to be sustained by evidence as to some of the workmen; held, also, that a combination to dictate to the master such workmen as he should employ was clearly illegal. (Id.)

The wife of one defendant to an indictment for a conspiracy is incompetent as a witness for another defendant. *Rex v. Locker*, 5 Esp. 107. Where, on an indictment for a conspiracy against A. B., C. D. was called as a witness and examined as to a conversation between himself and A., it was held, that the counsel for the prosecution were at liberty to examine him as to other conversations between A. and C., although they tended chiefly to criminate A. *Rex v. Kroehl*, 2 Stark. 343. On an indictment against several for conspiracy:—*Held*, that the prosecutor might have some of the defendants acquitted before the case was opened, for the purpose of calling them as witnesses. *R. v. Rowland*, R. & M. 401.

On an indictment for conspiring to charge the prosecutor with forging a cheque, the cheque need not be produced. *Rex. v. Aldridge*, 1 Nev. & M. 776.

A verdict may be found against A., who has appeared for conspiring with B., who has not appeared at his trial. *Rex v. Cooke*, 5 B. & C. 538; 7 D. & R. 673.

Upon the removal of an indictment for a conspiracy from the quarter sessions into the court of Queen's Bench, the defendant's recognisance, if insufficient, will be discharged, and a fresh one required. *Rex v. Hooper*, 1 Chit. R. 491. Although in a proceeding in the nature of a special verdict, as where the indictment is removed by *certiorari* into the Queen's Bench and set down for argument, it is not necessary that all the defendants should be present (*Rex v. Nicols*, 2 Stra. 1227); yet it is essential on motions in arrest of judgment (*Rex v. Spragg*, 2 Burr. 929; 1 Black. 209), or for new trials. *Rex. v. Askew*, 3 M. & S. 9. *Rex v. Cochrane*, cited 3 id. 10 n. *Rex v. Teal*, 11 East, 306.

[2] A conspiracy is punishable, like other misdemeanors (*Rex v. Kinnersley*, 1 Stra. 193) by imprisonment and hard labour. *Rex v. Parsons*, 1 Black. 401. *See* 14 & 15 Vic. c. 100, s. 27.

An information lies for a conspiracy (*Reg. v. Blackett*, 7 Mod. Rep. 39); but it must distinctly appear that the conspirators combined together. *Rex v. Hibers*, 2 Chit. 163.

person to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

CONSTABLE.[1]

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I. Appointment of.[2]

[1] A public civil officer, whose proper and general duty it is to keep the peace within his district. They are of two kinds, high and petty. Practically, most of their former duties are performed by the police.

[2] Every petty constable being a peace-officer, and it being necessary for the preservation of the peace that every vill should be furnished with one, the justices of the peace have, ever since the institution of their office, assumed the power as conservators of the peace, not only to swear the petty constables who have been chosen at a tourn or leet, but also to nominate and swear those who have not been chosen by them, on the neglect of the sheriff and lords of the manor. *See* 2 Hawk. P. C. 610. But the general quarter sessions, and not the petty sessions, must appoint the high constable. *Reg. v. Watkinson*, 2 Per. & D. 625.

Formerly it was decided that the sessions had no power to appoint a constable unless the court-leet neglected (*Rex v. Goudge*, 2 Stra. 1213. *Rex v. Bernard*, 12 Mod. 115; Comb. 416; 2 Salk. 502; Skin. 669; 1 Ld. Raym. 94); and in that case the appointment only extended until the lord should hold a court (*Rex v. Davis*, 2 Stra. 1050); but the sessions always had power to examine the legality of the election at the court-leet. *Rex v. Stevens*, T. Jones, 212.

By 5 & 6 Wm. 4, c. 76, in all boroughs within the Municipal Corporation Act the constables are appointed by the watch-com-

(A) *By whom and how Appointed.*

(*a*) *As to Special Constables.*[1]

mittee, and sworn in before some justice of the peace having jurisdiction within the borough (and *see* s. 86); and such committee, or any two justices having jurisdiction within the borough, may suspend or dismiss any of them they may think negligent in the discharge of his duty, or otherwise unfit for the same; after which he shall not be re-appointed without the consent of two justices. (Id. s. 77.) The watch-committee shall make regulations for preventing neglect or abuse, and for rendering such constables efficient in the discharge of their duties.

The vestry may resolve that one or more paid constable should be appointed for their parish, and the justices appoint such paid constables. 5 & 6 Vic. c. 109, ss. 18, 19. Their salaries are paid out of the poor-rates (s. 20).

By the 5 & 6 Vic. c. 109, for the appointment and payment of parish constables, the justices of the peace of every county in England are required, on some day after the 24th of March, and before the 9th of April following, in each year, to hold a special session of the peace in their several divisions, for the appointment of parochial constables. The justices issue precepts to the overseers requiring lists of men qualified to serve as constables, and the overseers summon a meeting of inhabitants in vestry, and make out the lists of the persons so qualified. (5 & 6 Vic. c. 109, ss. 2, 3.) The list is fixed on the church door, and is also kept by the overseers for inspection. The list is corrected at a special session, and is allowed by being signed by the justices present, or two of them. The justices then choose from the allowed list the names of such number of persons as they deem necessary, having regard to the extent and population of the parish, to act as constables within the parish during the year then next following, and until other constables are chosen and sworn to act in their stead. Ss. 7–11. Where a person has been chosen to serve, and has served the office of constable either in person or by substitute, he is not liable to be again chosen until every other person in the parish liable and qualified to serve has also served the office of constable, either in person or by substitute. S. 11.

A person chosen to be a constable may appoint a substitute, subject to the approval of the justices, to serve in his stead. 5 & 6 Vic. c. 109, s. 13. It is not necessary that the person named as substitute should himself be on the vestry list. *Reg. v. Booth*, 12 Q. B. 884.

By the 7 & 8 Vic. c. 33, s. 8, high constables previously appointed at quarter sessions may be appointed at special sessions.

The 19 & 20 Vic. c. 69, for rendering more effectual the police in counties and boroughs, makes (sect. 15) further provision for the consolidation of borough police, their powers, privileges, duties, and responsibilities; and by 20 Vic. c. 2, s. 4, the stats. 2 & 3 Vic. c. 93; 3 & 4 Vic. c. 88; and 19 & 20 Vic. c. 69, are to be construed together as one act.

[1] By 1 Geo. 4, c. 37, it is enacted, "that in all cases where it shall be made to appear to any two or more justices of the peace acting for any county, city, division, riding, or place, by the information on oath of five respectable householders of such county, city, division, riding, or place, that any tumult, riot, or felony has taken place, or is likely to take place, and may reasonably be apprehended, such justices may and are hereby authorised to call upon, nominate, and appoint, by precept in writing under their hands, any householders or other persons (not legally exempt from serving the office of constable) residing within their respective divisions, or the neighbourhood thereof, to act as special constables for such time and in such manner as the said justices shall deem fit and necessary for the preservation of the public peace, and for the prevention or suppression of any riot or felony."

By 1 & 2 Wm. 4, c. 41, s. 1, "in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding, or division, having a separate commission of the peace, or to any two or more justices of any liberty, franchise, city, or town in England or Wales, upon the oath of any credible witness, that any tumult, riot, or felony has taken place or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act; and such justices shall be of opinion that the ordinary officers appointed for preserving the peace, and for the protection of the inhabitants and the security of the property of any such parish, township, or place as aforesaid, then such justices, or any two or more justices acting for the same division or limits, may nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable; or by sect. 2, even persons exempt, if, upon the representation of two justices, one of the principal secretaries of state order it), residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof (or residing elsewhere, if willing, 5 & 6 Wm. 4, c. 43), to act as special constables, for such time and in such manner as to such justices shall seem fit and necessary for the preservation of the public peace, and for the protection of the inhabitants and the security of the property in such parish, &c.: Provided that, whenever it shall be deemed necessary to nominate and appoint such special constables as aforesaid, notice of such nomination and appoint-

(B) *Who are Eligible to Serve as.*[1]

ment, and of the circumstances which have rendered the same expedient, shall be forthwith transmitted by the justices making the same to one of the principal secretaries of state, and to the lieutenant of the county."

With respect to borough special constables, the 5 & 6 Wm. 4, c. 76, s. 83, enacts, "that in October in every year any two or more justices of the peace of any borough shall nominate and appoint, by precept in writing under their hands, so many as they shall think fit of the inhabitants of such borough (not legally exempt from serving the office of constable) to act as special constables within such borough, whenever thereunto required by warrant from any justice of the borough, but not otherwise; and every such warrant shall recite that, in the opinion of the justice granting the same, the ordinary police force of the borough is insufficient to maintain the peace of the borough."

[1] All inhabitants are eligible to serve the office of constable. *Anon.* 12 Mod. 256. The mere occupation of an office of business within the parish is, it appears, not sufficient, if the occupier's dwelling-house is situate elsewhere. *Rex v. Adlard*, 4 B. & C. 772; 6 D. & R. 340: but see *Rex v. Oswald*, 3 Ad. & E. 488; 5 Nev. & M. 261. And an inhabitant may be specially privileged, as by a grant of exemption from the Crown (*Rex v. Clark*, 1 T. R. 679), or statutable certificate; but a certificate of exemption from all ward offices does not apply to the office of constable. *Rex v. Darbyshire*, 2 Burr. 1182. And by the 5 & 6 Vic. c. 109, s. 5, "every able-bodied man resident within the parish, between the ages of twenty-five and fifty-five years, rated to the relief of the poor, or to the county-rate, on any tenements of the net yearly value of four pounds or upwards, except such persons as shall be exempt or disqualified as hereinafter mentioned, shall be qualified and liable to serve as constable of that parish."

Sect. 6 enumerates the persons who are exempt, and enacts "that all peers, all members returned to serve in the Commons House of Parliament, all judges of her Majesty's courts of record at Westminster, all justices of the peace, all deputy lieutenants, all clergymen in holy orders, all priests of the Roman Catholic faith who shall have duly taken and subscribed the oaths and declarations required by law, all persons who shall teach or preach in any congregation of Protestant dissenters whose place of meeting is duly registered, and who shall follow no secular occupation except that of a schoolmaster, producing a certificate of some justice of the peace of their having taken all the oaths and subscribed the declaration required by law; all schoolmasters; all barristers and serjeants-at-law actually practising; all members of the society of doctors of law and advocates of the civil law actually practising; all attornies, solicitors, and proctors duly admitted in any court of law or equity, or of ecclesiastical or admiralty jurisdiction, in which attornies, solicitors, and proctors have usually been admitted, actually practising and having duly taken out their annual certificate; all conveyancers and special pleaders below the bar; all officers of any such courts actually exercising the duties of their respective offices; all coroners, gaolers, and keepers of houses of correction; all members and licentiates of the Royal College of Physicians in London actually practising; all surgeons, being members of one of the Royal Colleges of Surgeons in London, Edinburgh, or Dublin, and actually practising; all apothecaries having obtained a certificate to practise as an apothecary from the master, wardens, and society of Apothecaries of the city of London, and actually practising; all officers in her Majesty's army or navy on full pay; all persons enrolled and serving in any corps of yeomanry under officers having commissions from her Majesty, or lieutenants of counties, or others specially authorised by her Majesty for that purpose; all pilots authorised by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne; and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed by the lord warden of the Cinque Ports, or under any act of parliament or charter for the regulation of pilots in any other port; all the household servants of her Majesty; all officers of customs and excise; all sheriffs and sheriffs' officers; all high constables; the clerks of all boards or guardians of the poor established under the act for the Amendment and better Administration of the Laws relating to the Poor in England and Wales; the masters of all union workhouses; all county or district constables; all parish clerks; all registrars and superintendent registrars of births, deaths, and marriages; all churchwardens, overseers, and relieving officers, shall be free and exempt from serving the office of constable under this act."

And by sect. 7 it is enacted, "that all licensed victuallers, and all persons licensed to deal in any exciseable liquors, or to sell beer by retail; all gamekeepers, and all persons who have been attainted of any treason or felony, or convicted of any infamous crime, shall be disqualified from serving the office of constable under this act."

A barrister is not liable to serve the office of constable. *Poordage's case*, 1 Mod. 22. *See* 2 Hale, P. C. 103.

Publicans cannot be constables. *Anon.* 6 Mod. 42. Servants of members of parliament are exempt. *See* 2 Hawk. P. C. c. 10, s. 39; 10 Geo. 3, c. 50. By custom, it seems that other surgeons as well as members of the college are exempt from being

(C) *Consequences of Refusal to Serve.*[1]

(D) *Duration of Office.*[2]

It is a constable's duty to continue in office until a new one be appointed. *Anon.* 12 Mod. 256. And by the 13 & 14 Car. 2, c. 12, s. 15, if a constable shall continue above a year in his office the sessions may discharge him, and put another in his place till the court shall hold a leet.

(E) *Right to Expenses of his Office.*[3]

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chosen constables. *Rex v. Pond*, 1 Com. 312. *Women may* be chosen *as constables. Rex v. Stubbs*, 2 T. R. 406.

A college barber at Oxford, though he resides in the city out of the college, seems exempt from serving the office of constable, being entitled to the privileges of the University. *Rex v. Routledge*, 8 Dougl. 531.

If a privileged person be improperly chosen constable, it seems such person may be relieved by the Court of Queen's Bench. *See* 2 Hawk. P. C. c. 10, s. 41.

On an application for a *quo warranto* against a constable, the affidavits must, in negativing his due election, expressly show an unequivocal custom to elect in a particular manner. *Rex v. Lane*, 5 B. & A. 488; 1 D. & R. 76.

One magistrate may swear in a constable. *Rex v. Franchard*, 2 Stra. 1149. And to compel the swearing, a *mandamus* lies to the steward of a court-leet. *Davenport v. Israel*, Comb. 285. No particular form being directed by any statute for the constable's oath, it has long been the practice to swear them generally "to the due execution of the duty as constables till others are appointed in their places." Dick. *Sess. Guide*, 62. The persons elected must, it seems, be summoned and directed when and where to take the oaths of office. *Fletcher v. Ingram*, 5 Mod. 129.

[1] The constable must be duly sworn before he can hold office (*Rex v. Roberts*, 3 Ad. & E. 771; 5 Nev. & M. 130); and a refusal to be sworn is a refusal to take office. *Rex v. Brain*, 3 B. & Adol. 614. A refusal to serve as constable is an indictable offence (*Reg. v. Vincent*, 9 C. & P. 91); or he may be amerced at the court-leet (*Rex v. Lone*, 2 Stra. 920); but the penalties incurred cannot be distrained for in the absence of an express custom authorising the distress. *Fletcher v. Ingram*, 1 Salk. 175; 5 Mod. 129; 1 Ld. Raym. 69; Comb. 350; Holt, 187.

By the 13th section of the 5 & 6 Vic. c. 109, it is enacted, "that every person qualified and liable to serve, and who shall be chosen by the justices to serve the office of constable, and shall be duly summoned to be sworn and to take upon him the said office, and who shall refuse, or without reasonable cause, to be allowed by the said justices, neglect to attend and to be sworn as constable, or to find a qualified substitute to be sworn in his stead, shall, upon conviction thereof before two justices, forfeit and pay any sum not more than ten pounds; and every person who after being sworn as constable shall refuse or wilfully neglect to act in the execution of his office, shall, upon conviction thereof before two justices, forfeit and pay for every such offence any sum not more than five pounds."

[2] A constable may appoint a deputy (*Peake v. Bourne*, 2 Stra. 943. *Pane's case*, 1 id. 355), on the appointment of whom the principal's responsibility ceases. *Underhill v. Witts*, 3 Esp. 56. *Vane's case*, 2 Keb. 309.

High and petty constables are removable. *Rex v. White*, 1 Salk. 150. But the sessions cannot discharge constables appointed by the leet (*The Constables of Limington's case*, 2 Stra. 798); nor can they appoint others, unless the leet neglects. *Rex v. Lashmere*, 11 Mod. Rep. 380.

[3] By 27 Geo. 2, c. 20, the constable executing a justice's warrant for levying a penalty or other sum of money directed by an act of parliament by distress, may deduct his own reasonable charges for taking and keeping and selling the goods distrained, returning the overplus on demand, after such penalty or sum of money and charges deducted. A person committed to gaol for any misdemeanor shall bear his own charges (if able), for conveying or sending him to the said gaol, and the charges of those that guard him thither; and if he shall refuse at the time of commitment to defray the same, and shall not then pay the same, the justice committing him shall, by warrant to the high or petty constable where the person shall inhabit, or from whence he shall be committed, or where he shall have any goods within the county, order so much to be sold thereof as by his direction shall satisfy the same, the appraisement to be made by four honest inhabitants. 3 Jac. 1, c. 10. And if he have not money or goods within the county sufficient to bear the charges of himself and those who convey him to the gaol or house of correction, the constable may make application to a justice, who may upon oath examine into and ascertain the reasonable expenses, and shall by his warrant (without fee) order the treasurer to pay the same, except in Middlesex, where the same shall be paid by the overseers of the parish where the person was apprehended. 27 Geo. 2, c. 3. And by 41 Geo. 3, c. 78, two justices may order an allowance to be made to any constable for extraordinary expenses incurred in the execution of their duty in

II. Duties and Privileges of.

(A) *Duties of Constables.*[1]

cases of tumult, riot, or felony, such order to be submitted to the sessions for their allowance. A *mandamus* lies to reimburse constables as to extraordinary expenses. *Rex v. Hunt*, 1 Stra. 42, 93. But a constable who apprehended a party for a misdemeanor, committed in his presence in a chapel, and conveyed him before a magistrate, by whom he was bound over to prosecute, and who expends money in carrying on such prosecution, such expenses cannot be included in his accounts, under the 18 Geo. 3, c. 19, s. 4, as monies expended on account of the township (*Rex v. Seville*, 5 B. & A. 180); nor expenses incurred by a constable in indicting a party for assaulting him in the execution of his office, although the prosecution was directed by a magistrate. *Rex v. Bird*, 2 id. 522. By the 41 Geo. 3, c. 78, two justices of the peace may order proper allowances to be made to special constables for their expenses and loss of time, which order shall be submitted to the quarter sessions.

By 5 & 6 Wm. 4, c. 76, s. 82, "the treasurer of the borough shall pay the constables such salaries, wages, and allowances, and at such times as the watch-committee (subject to the approbation of the council) direct; and the council shall order to be paid any extraordinary expenses which such persons shall appear to have necessarily incurred in apprehending offenders, and executing the orders of any justice of the peace having jurisdiction within such borough, such expenses having been first examined and approved by such justice; and the said treasurer shall also pay such further sums as the watch-committee (subject to the approbation of the council) award to any of the constabulary force as a reward for extraordinary diligence or exertion, or as a compensation for wounds or severe injuries received in the performance of their duty, or as an allowance to such of them as shall be disabled by bodily injury received, or shall be worn out by length of service, and all other charges and expenses which the watch-committee shall (subject to the approbation of the council) direct to be paid, for the purposes of the constabulary force under this act."

The high constable is entitled to the compensation paid by him to special constables in cases of riot. *Rex v. Justices of Leicester*, 7 B. & C. 6.

[1] But where there is a chief or superintendent constable, the parish constables within his district are subject to his authority. Sec. 15.

See 10 & 11 Vic. c. 89, "An Act for Consolidating in one act certain provisions usually contained in acts for regulating the Police of Towns;" and *see post*, Police.

By the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), constables appointed and sworn as there directed shall, "not only within the borough, but also within the county in which such borough, or part thereof, shall be situated, and also within every county being within seven miles of such borough, and also within all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities, as any constable duly appointed now has or hereafter may have within his constablewick, by virtue of the common law of this realm, or of any statute made or to be made, and shall obey all such lawful commands as they may from time to time receive from any of the justices of the peace within such borough, or within any county in which they shall be called on to act as constables, for the conducting themselves in the execution of their office."

A constable may be indicted for a neglect of duty. *Rex v. Wiat*, 11 Mod. 54; 1 Salk. 380; 2 Ld. Raym. 1189; Fortesc. 127.

By 5 Geo. 4, c. 18, constables are authorised to execute warrants out of their own precincts, provided it be within the jurisdiction of the justices granting and backing the same. A warrant directed to a constable by his name of office not only gives him an authority to act beyond the limits to which his office extends, but if addressed to him by name, he may execute it anywhere within the limits of the magistrate's authority. *Rex v. Weir*, 1 B. & C. 288; 2 D. & R. 444. *Case of the Village of Chorley*, 1 Salk. 176; S. C. 3 Salk. 98; S. P. *Milton v. Green*, 5 East, 233. *Blatcher v. Kemp*, 1 H. Black. 15, n.

This statute does not apply to cases where warrants are issued by the judges of the Court of Queen's Bench, but is confined to warrants issued by justices of the peace of limited jurisdiction. A bench warrant, therefore, cannot be executed by a constable out of his jurisdiction. *Gladwell v. Blake*, 1 C., M. & R. 636; 5 Tyr. 186.

It is the duty of constables to enforce the penalties against alehouse-keepers (*see* 1 Jac. 1, c. 9; 3 Car. 1, c. 4; 26 Geo. 2, c. 31); to make an assessment for the repairs of bridges (1 Hawk. P. C. c. 77, s. 7); to pursue burglars (Cro. Eliz. 16); to assist in the management and enforcement of the customs (12 Car. 2, c. 19; 13 & 14 id. c. 11); to prevent drunkenness (4 Jac. 1, c. 5); to pursue felons and keep the goods found on them until trial, and then return them as directed by the court; to assist at fires; to enforce the statutes against unlawful fishing; to assist in forcible entries (5 Rep. 2); to assist in putting the statutes in force against hawkers and peddlers (8 & 9 Wm. 3, c. 25; 11 Geo. 2, c. 26); to suppress illegal lottery-offices (27 Geo. 3, c. 1); to search and examine if any person use other measures than those agreeable to the standard (37 Geo. 2, c. 17); to make presentments against a breach of the peace

5 & 6 Vic. c. 109, s. 15, enacts, "that parish constables shall have within the whole county, and also within all liberties and franchises, and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges, and immunities, and shall be liable to all the duties and responsibilities, of a constable within his constablewick, but shall not be bound to act as a constable beyond the parish for which they are severally appointed and sworn, without the special warrant of a justice of the peace."

(B) *Entitled to be Assisted.*

Refusing to assist a constable is an indictable offence. *Rex v. Wildbore*, Camp. 309.[1]

(C) *Authority to take Bail.*[2]

(Dalt, J. P. 474); to assist in levying duties on servants (25 Geo. 3, c. 43); to enforce acts against the profanation of a Sunday (1 Car. 1, c. 1; 29 Car. 2, c. 7); to levy penalties for swearing (*see* 19 Geo. 2, c. 21); to assist in enforcing the laws regulating turnpikes; to assist in enforcing the laws against vagrants; and to assist in saving ships from wrecks. 12 Anne, st. 2, c. 18. Formerly it was deemed a duty of constables to make presentments of all offences committed within their respective constablewicks, at the petty sessions holden next before the assizes or quarter sessions, and which were then returned to the assizes or sessions by the justices; but this has been virtually abolished by stat. 7 & 8 Geo. 3, c. 38.

It is the duty of a constable executing a warrant, if required, to show the same to the person against whom it is issued (*see* 27 Geo. 3, c. 20), unless he be sworn and commonly known to be an officer, and act within his own precincts; then he need not show his warrant to the party, notwithstanding he demand the sight of it (*see* 2 Hawk. P. C. c. 13, s. 28; 1 Hale, P. C. 458; 1 East, P. C. 319); but in no case is a constable justified in parting with the warrant out of his own possession. *See* 1 East, P. C. 319.

By the Municipal Corporation Act (5 & 6 Wm. 4, c. 76, s. 78), "such constable, during the time of his being on duty, may apprehend all idle and disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of intention to commit a felony," and deliver them into the custody of the constable in attendance at the nearest watch-house, in order that they may be secured until they can be brought before a justice of the peace, or give bail, conditioned for their appearance before a justice, if the constable think fit to take it.

[1] But where a person assisted a constable who was making an illegal arrest, and another person in endeavouring to rescue the prisoner suddenly, and without any precedent malice, killed the man who was acting by the command and in aid of the constable, it was holden manslaughter and not murder. *Rex v. Tooley*, 11 Mod. 242; 2 Ld. Raym. 1296; Holt, 485.

[2] By the 5 & 6 Wm. 4, c. 76, s. 79 (Municipal Corporation Act), "where any person is brought in custody to the watch-house, charged with any petty misdemeanor, the constable in attendance may, if he think fit, take bail in recognisance for his appearance within two days before a justice of the peace, at a time and place to be specified, and shall enter in a book, to be kept for that purpose in every watch-house, the names, residences, and occupations of the party and his surety or sureties (if any) entering into such recognisance, together with the condition thereof and the sums respectively acknowledged, and shall lay the same before such justice as shall be present at the time and place when and where the party is required to appear; and if the party does not appear at the time and place required, or within one hour after, the justice shall require a record of the recognisance to be drawn up and to be signed by the constable, and shall return the same to the next general or quarter sessions of the peace for the borough or for the county in which such borough is situate, in those boroughs for which there shall be no separate or general quarter sessions of the peace, with a certificate at back thereof, signed by such justice, that the party has not complied with the obligation therein contained; and the clerk of the peace shall make the like extracts and schedules of every such recognisance as recognisances forfeited in the sessions of the peace; and if the party not appearing shall apply by any person on his behalf to postpone the hearing of the charge against him, and the justice shall think fit to consent thereto, the justice shall be at liberty to enlarge the recognisance to such further time as he shall appoint; and when the matter shall be heard and determined, either by the dismissal of the complaint, or by binding the party down to answer the matter thereof at the sessions or otherwise, the recognisance for the appearance of the party before a justice shall be discharged, without fee or reward."

(D) *Acting with or without Warrant.*

(*a*) *He is justified in Arresting a Person charged with Felony without Warrant.*

HOGG v. WARD, 3 H. & N. 417; 27 L. J. Ex. 443; 6 W. R. 597.

A constable is justified in arresting without warrant a person charged by another with felony, provided the circumstances are such that he might reasonably act upon the charge in making the arrest.[1]

In an action of false imprisonment the defendant justified that he was a constable, and apprehended the plaintiff without warrant, on a charge of felony. It appeared that the plaintiff was a tradesman well known to the defendant, and who had resided in the same neighbourhood for many years, and bore a respectable character, and that the charge was made by an itinerant showman, who said he identified some traces on the plaintiff's horse as having been stolen from him at a fair several months before. *Martin, B.*, who had the cause, directed the jury, that if it was an unreasonable charge of felony the constable was not justified in acting upon it. A verdict having been given for the plaintiff, the question was reserved for the court.

Pollock, C. B. "According to the law as stated by text writers, and as it is found in the authorities, in order to justify a constable in arresting without a warrant a person charged by another with felony, there must be a reasonable charge. I think, in the present case, there was not a reasonable charge; whether the question of the reasonableness of the charge is to be decided by the judge as a matter of law, or by the jury as a question of fact, it is not necessary to consider, because the question was expressly reserved for the decision of the court, whether there was reasonable ground for the arrest or not."

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[1] A constable has no power at common law to arrest a person without warrant on supicion that he has committed a misdemeanor. *Griffin v. Colman*, 4 H. & N. 265; 28 L. J. Ex. 134. *Bowditch v. Balchin*, 5 Ex. 380. If, however, he has reasonable cause to suspect that a person has committed a felony, he may detain such person until he can be brought before a justice of the peace to have his conduct investigated. *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487.

If an arrest by a constable is in its inception wrongful, all the constables who aid and assist in the continuance of the wrongful imprisonment are responsible for the entire damage thereby caused to the plaintiff, although they had no knowledge of the unlawfulness of the imprisonment, and intended to act in discharge of their duty. *Griffin v. Colman*, 4 H. & N. 265; 28 L. J. Ex. 134.

If one man charges another with having robbed him, and desires a constable to apprehend the suspected thief, and the constable does so without warrant, the constable is not responsible for the imprisonment if it should turn out that the charge was false and that no felony was committed. *Davis v. Russell*, 5 Bing. 554; 2 M. & P. 607. *Samuel v. Payne*, 1 Dougl. 360.

If an assault is committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression "recently," for the purpose as well of preventing a further breach of the peace as to take the offender before a magistrate. *Reg. v. Light*, 27 L. J. M. C. 1.

A constable may, without warrant, detain a person on suspicion of felony; but a private individual cannot do so unless a felony has been actually committed. *Beckwith v. Philby*, 6 B. & C. 635. But merely conversing with a reputed thief is no ground for taking a person into custody. *Stocken v. Carter*, 4 C. & P. 477. And a constable has no right to interfere after an affray is over. *Cook v. Nethercote*, 6 C. & P. 741. See *Clifford v. Brandon*, 2 Camp. 358); but it has been held, that where a tax-collector is apprehensive of violence a constable who enters to preserve the peace is justified. *Rex v. Clarke*, 4 Nev. & M. 671.

Where a constable has a warrant it is his duty not to go beyond the power conferred upon him by the warrant (*Anon.* 12 Mod. 344), but to act strictly as it directs (*Reg. v. Tooley*, 11 Mod. 248). A warrant, therefore, authorising a constable to seize certain articles, does not sanction his taking other things not specified, where they furnish no evidence of guilt. *Crozier v. Cundy*, 6 B. & C. 232.

A constable, in clearing a passage in a crowd, has no right to strike a party—he must remove him. *Imason v. Cope*, 5 C. & P. 193.

The presentment of a nuisance by a constable must be before a grand jury, on oath. *Rex v. Bridgewater and Taunton Canal Co.* 7 B. & C. 514.

It being the duty of a constable to make arrests, if he be killed in executing it, it is murder (*Rex v. Tooley*, 11 Mod. 242; 2 Ld. Raym. 1296; Holt, 485); and if a felon in any case resist or flee, whether after arrest or before, and cannot be taken, the constable may kill him, and such killing is justifiable. *See* 1 Hale, P. C. 481; 2 id. 90. When a felony has actually been committed, the constable, or any person, upon probable grounds of suspicion, may lawfully apprehend the person suspected, and carry him before a justice (2 Hale, P. C. 9; 11 Mod. 248; 2 Hawk. P. C. c. 11, s. 15);

III. Actions against.

(A) *Perusal and Copy of his Warrant must be Demanded before Action.*

Perusal and copy of his warrant must be demanded before action.[1]

By the 24 Geo. 2, c. 44, s. 6, it is enacted, that "no action be brought against any constable, headborough, or other officer, or against any person acting by his order, and in his aid, for anything done in obedience to the warrant under the hand and seal of any justice of the peace, until demand hath been made or left at the usual place of his abode, by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand; and if after compliance any action shall be brought against such constable, headborough, or other officer, or against such person acting in his aid, for any such cause as aforesaid, without making the justice or justices who signed or sealed the said warrant defendant or defendants, or producing such warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction in such justice or justices. And if such action be brought jointly against such justice or justices, and also against such constable or other officer, &c. on proof of such warrant, the jury shall find for such constable, notwithstanding such defect of jurisdiction as aforesaid; and if the verdict be given against the justice or justices, the plaintiff shall recover his costs against him, to be taxed in such manner by the proper officer, as to include such costs as the plaintiff is liable to pay to such defendant, for whom such verdict shall be found as aforesaid."

(*a*) *Form of Demand of Perusal and Copy of Warrant.*[2]

(B) *And a Month's Notice of Action must be given.*[3]

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and in case of a felony committed, or danger of its being committed or apprehended, the constable, either upon complaint or hue and cry, may break open the doors to take the offender, if upon demand and notice he will not yield himself, or entrance be refused, or if the constable act under a magistrate's warrant, for treason or felony. *See* 2 Hale, P. C. 82; Brownl. 211; 1 Bulst. 146. So, the constable may officially imprison for a time to prevent felony: as if he see two with weapons drawn ready to fight. *See* Moor, 284; Poph. 13.

Various statutes provide for the punishment of all persons who shall assault peace officers or revenue officers (9 Geo. 4, c. 31, s. 25); metropolitan police officers (2 & 3 Vic. c. 47, s. 18); special constables and district constables (1 & 2 Wm. 4, c. 41, s. 11; 2 & 3 Vic. c. 93, s. 8), in the execution of their duty, or aid or incite others to do so.

[1] From this clause it seems, that the constable ought not to return the warrant to the justice, but to keep it for his own justification; for he cannot grant to the party the perusal of the warrant unless he has it, but he must certify to the justice what he has done in the execution thereof. Constables are only within the statute 24 Geo. 2, c. 44, s. 6, when they act in obedience to the justices' warrant. *Milton v. Green*, 5 East, 232; 1 Smith, 402.

By the 24 Geo. 2, c. 44, no action shall be brought against any constable acting as directed by the statute, but within six calendar months after the act committed. But the statute only applies to cases where the officer acts under a warrant. *Postlethwaite v. Gibson*, 3 Esp. 226.

The giving a party into custody upon a fair belief of his having committed a felony: —*Held*, not to bring the party within the 7 & 8 Geo. 4, c. 29, which extends only to constables, &c., entitling them to notice of action. *Brooker v. Field*, 9 C. & P. 651.

The demand of warrant need not state any time. *Collins v. Rose*, 5 Mee. & W. 194; 7 Dowl. 796.

[2] To C. D.

I do hereby, as the attorney [*or* agent] of and for A. B., according to the form of the statute in such case made and provided, demand of you the perusal and copy of the warrant, by virtue or under colour of which you did, on or about the day of last, arrest and take into custody [*or as the case may be*] the said A. B.

J. N. of attorney of the said A. B.

Dated, &c.

[3] Most acts of parliament conferring special powers and authorities upon constables and officers for the accomplishment of particular purposes, contain the usual clause for the protection of persons acting in execution of the act, making the cause of action local, requiring it be commenced within a limited time, and that notice must previously be given, enabling the defendant to plead the general issue, and give in evidence special circumstances of justification, and disentitling the plaintiff to recover after tender of amends. *See* the Mutiny Act; the Game Acts; Malicious Trespass Act; the

(C) *Venue must be laid in County where Acts complained of were Committed.*

(D) *And he may give Special Matter in Evidence under the General Issue.*

A constable is entitled to notice one month before action, where sued for anything done in his office.[1]

The 7 & 8 Geo. 4, c. 29, s. 41, enacts, "that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed,[2] and shall be commenced within six calendar months after the fact committed, and not afterwards; and notice in writing of such action, and the cause thereof, shall be given to the defendants one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had

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Act for Preventing Cruelty to Animals; the Revenue, Customs, and Excise Acts; the Public Health, &c. See *Rudd v. Scott*, 2 Scott, N. R. 631. *Hopkins v. Crowe*, 4 Ad. & E. 774.

[1] The constable is entitled to notice of action, notwithstanding he may have acted beyond the limits of his authority; indeed, as it has been frequently observed, the notice is of no use to them when they have acted within the strict line of their duty, and is only operative for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceed it. "The object," said *Lord Ellenborough*, "clearly is to protect persons acting illegally, but in supposed pursuance, and with a *bonâ fide* intention of discharging their duty under the act of parliament. Where the law is not exceeded the protection is not required." *Theobald v. Crichmore*, 1 B. & A. 229. "It is not wanted by those who are in the right, and have a perfect justification under the act of parliament, but by those who are in the wrong, in order that they may have an opportunity of rendering amends. If the defendant *bonâ fide* believed that he was acting in pursuance of the statute, that is all that is necessary to entitle him to notice of action." *Per Jervis, C. J.: Read v. Cocker*, 13 C. B. 86; 22 L. J. C. P. 205. See *Horn v. Thornborough*, 3 Ex. 850. *Smith v. Hopper*, 10 Q. B. 1014. *Booth v. Clive*, 10 C. B. 827. *Cox v. Reid*, 13 Q. B. 558. *Hughes v. Buckland*, 15 Mee. & W. 353. *Kine v. Evershed*, 10 Q. B. 150. In order however to entitle him to notice of action, it is necessary that the act done should be of that nature and character that he might reasonably have supposed that the act of parliament gave him authority to do it. If there was no reasonable ground for such a supposition, he will not be within the protection of the statute. *Rudd v. Scott*, 2 Scott, N. R. 633.

The 79th sect. of the Metropolitan Police Act (2 & 3 Vic. c. 47), enacts, that that act is to be construed as one act with the 10 Geo. 4, c. 44, the 41st sect. of which provides that notice of action must be given to all persons acting in the execution of that act. If, therefore, a party has reasonable ground for believing that he is entitled to arrest a person found committing an act prohibited by the Metropolitan Police Act, he is entitled to notice of action. *Danvers v. Morgan*, 1 Jur. N. S. 1051. *See* 2 & 3 Vic. c. 71, ss. 52, 53.

A person acting, when required by the constable to assist him, is within the protection of the statute, and entitled to notice; but if he act as prime mover and principal in setting the constable in motion, so that the constable is commanded by him, and not he by the constable, he cannot be considered to be acting in aid of the constable, and is not within the protection of the statute. *Straight v. Gee*, 2 Stark. 449.

A notice of action to a constable or officer should set forth the substantial ground of complaint against him, and should specify the time and place of the commission of the grievance. *Breese v. Jerdein*, 4 Q. B. 585. *Taylor v. Hasfield*, 33 L. J. M. C. 169. *Martins v. Upcher*, 3 Q. B. 668. *Jones v. Nicholls*, 13 Mee. & W. 361. *See* further, *post*, Notice of Action.

As to the sufficiency of the notice see *Breese v. Jerdein*, 4 Q. B. 585; 2 Gale & D. 720; and *post*, Notice of Action. Where a local act for watching the town of Stalybridge empowered the commissioners therein named to appoint a constable and assistant constables "for executing all such warrants, &c., as the justices of the peace acting for the counties palatine of Lancaster and Chester, or any of them, shall from time to time direct to them to be executed within the town;" and by another sect. it was enacted that "no plaintiff should recover for anything done in pursuance of the act;" it was held that a constable appointed under the act, and directed by a warrant of a justice acting for the counties palatine to enter a house, and seize goods under the 11 Geo. 2, c. 191, was not entitled to notice of action. *Shatwell v. Hall*, 10 Mee. & W. 523; 3 Dowl. N. S. 567; 12 L. J. Ex. 74.

A constable who considers he is acting *bonâ fide* is entitled to notice of action under this statute. *Ballinger v. Ferris*, 1 Mee. & W. 628; 1 T. & G. 920.

[2] Although a constable has exceeded his authority, he is within the 21 Jac. 1, c. 12, and therefore entitled to an acquittal, unless the venue be laid in the proper county. *Straight v. Gee*, 2 Stark. 445. And he may as such justify under the general issue; though if he be a private individual acting in aid of a constable a different rule obtains. *M'Clougham v. Clayton*, Holt, N. P. 478.

thereupon,[1] and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought."

(E) *If sufficient Amends tendered before the Action, the Plaintiff cannot recover.*

If sufficient amends tendered before action, the plaintiff cannot recover.

10 & 11 Vic. c. 89,[2] "for Consolidating the Provisions usually contained in Acts for regulating the Police in Towns," sect. 72, enacts, that "if any party have committed any irregular trespass, or other wrongful proceeding, in the execution of this or the special act, or any act incorporated therewith, or by virtue of any power or authority thereby given; and if before action brought in respect thereof such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender have been made, the defendant, by leave of the court where such action is pending, may, at any time before issue joined, pay into court such sum of money as he thinks fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court."

(F) *If Successful, he is entitled to Double Costs.*[3]

By 1 & 2 Jac. 1, c. 5, and by 21 Jac. 1, c. 12, it is enacted, that if any action be brought against a constable for anything done by virtue of his office, he, and also all others who in his aid, or by his command, shall do anything concerning his office, shall, if he recover, have double costs; but it must be certified by the judge that he was acting in the execution of his office.[4]

CONSTRUCTIO Legis non facit Injuriam. *The Law will adopt such a Construction as avoids Injury.* "Whensoever the words of a deed, or of the parties without deed, may have a double intendment, and one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Litt. 42, 183; 2 Bl. Com. 380; Shep. *Touch.* 88; Broom's *Max.* 465.

CONSTRUCTION of Statutes. *See* Statutes; and *see* 13 & 14 Vic. c. 21, s. 4; 7 & 8 Geo. 4, c. 28 s. 14.

CONSUETUDO ex certâ Causâ rationabili usitata privat communem Legem. Litt. 169; Co. Litt. 33, b. *Custom, when grounded on a certain and reasonable Cause, supersedes the common Law.* Broom's *Max.* 714.

The wardmote book of the city of London is the best evidence of the appointment of a deputy constable. *Underhill v. Witts*, 3 Esp. 56. The regular proof of a person being a constable is by the production and proof of his appointment and swearing at the court-leet, or by justice of peace. *See* 13 & 14 Car. 2, c. 12, s. 15; 2 Hawk. P. C. c. 10, s. 137; Stra. 1149; 1 Bac. Abr. 439. And it has been holden on a trial for murder, that proof that a party acted as constable is evidence to prove that he is one. *See* 2 Leach, 581; 4 T. R. 366; 3 Camp. 432. Where actions had been commenced against constables for seizing goods suspected to have been stolen, and against the informer for the injury sustained, the court would not hear evidence of special damage in the former action while the latter suit was pending. *Price v. Messenger*, 3 Esp. 96; 2 B. & P. 158.

[1] *See* Reg. Gen. H. T. 1853 (Pr.) r. 182.

[2] *See* also 11 & 12 Vic. c. 44, s. 9; 5 & 6 Wm. 4, c. 76, s. 133, Municipal Corporation Acts.

[3] A full indemnity is substituted for double costs by the 5 & 6 Vic. c. 97.

[4] The judge who tried the cause, by the express words of the 7 Jac. 1, c. 5, must certify that the defendant acted by virtue of his office, or make him an allowance of double costs upon the record, in order to entitle the defendant to double costs. *Grindley v. Holloway*, 1 Dougl. 307. See *Norman v. Danger*, 3 Y. & J. 203. *Penney v. Slade*, 5 Bing. N. C. 469.

The statute applies to a police constable appointed under the Municipal Corporation Act. *Maberley v. Pitterton*, 9 Dowl. 234.

It has been held that a judge has no power to certify to deprive a constable of his costs when joined with a defendant, and who was acquitted, by certifying, under the 8 & 9 Wm. 3, c. 11, s. 1, that there was reasonable cause for making him a co-defendant in the action. *Humphrey v. Woodhouse*, 3 Dowl. 416; 1 Bing. N. C. 506; 1 Scott, 395.

CONSUL.[1] Authority of British Consul abroad to administer oaths and take affidavits, *see* Affidavit, vol. i. p. 248.

CONTEMPORANEA Expositio est optima et fortissima in Lege. 2 Inst. 11. *The best and soundest Exposition of an Instrument is afforded by the circumstances under which it was made.*[2]

CONTEMPT.

I. Against the Queen's Person or Government.[3]

II. Against Courts of Justice. *See* Attachment, vol. i. p. 575; Courts; Fines; Trial.

CONTINUANCE, Notice of.

Reg. Gen. (Pr.) H. T. 1853, r. 36. "Notice of trial or inquiry may be continued to any sitting in or after term, on giving a notice of continuance four days

[1] A public agent appointed by a government to reside in a foreign country to protect the commercial interests and privileges of the state he represents. *See* 1 Chit. *Crim. Law*, 48, 49; 3 M. & S. 292.

[2] If it be doubtful on the face of an instrument whether a present demise or future letting was meant, the intention of the parties may be elucidated by the conduct they have pursued; and where the words of the instrument are ambiguous, the court will call in aid acts done under it as a clue to the intentions. *Chapman v. Bluck*, 4 Bing. N.C. 187. *Doe d. Pierson v. Ries*, 8 Bing. 181. "Great regard ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made." 2 Inst. 11, 136. See *Corporation of Newcastle v. Attorney-General*, 12 Clark & Fin. 419; Broom's *Max.* 532.

[3] All contempts against the Queen's person or government are highly criminal, and punishable with fine and imprisonment: as, by endeavouring to frighten the Queen into a change of her measures with threats of the uneasiness of her subjects, or by subscribing a petition to her, in which it is intimated that if it be denied many thousands will be discontented, &c. (*see* Cro. Jac. 37; Moor, 756; Noy. 101); or by spreading false rumours concerning the Queen's intentions, as that she designs to grant a toleration to the Papists, &c. (Cro. Jac. 38), or speaking contemptuously of her, as by warning her, &c., or giving out that she wants wisdom, valour, or steadiness; or in general doing anything which may lessen her in the esteem of her subjects, and weaken her government, or raise jealousies between her and her people. *See* Cro. Car. 117. So, doing an act which impliedly encourages rebellion; as, by absolving at the gallows those who, being condemned for high treason, show no sign of repentance, but persist in justifying the fact; or by drinking to the pious memory of a person executed for high treason. 1 Cro. Jac. 37; Moor, 756; Noy. 101.

Contempts against the Queen's prerogative are of so various a nature, that they cannot well be reduced to certain heads; however, the principal of them seem to come under the following divisions: 1st, refusing to assist the Queen for the good of the public; 2nd, preferring the interests of a foreign state to that of our own; and lastly, disobeying the Queen's lawful commands or prohibitions. As to the first, it is a high contempt for any subject to deny the Queen that assistance for the good of the public, either in her councils or by wars, which by the law he is bound to give; as, for a peer not to come to the parliament at the day of summons (*see* Moor, 978; Noy. 102); or to depart this realm without the Queen's license. *See* Staunf. P. C. 38. Secondly, it is a high contempt to prefer the interest of a foreign state to that of our own: it is criminal to do anything which may but incline a man so to do; as, to receive a person from a foreign prince without the leave of our Queen. *See* Hawk. P. C. c. 18, s. 10. And lastly, it is also a contempt to disobey the Queen's lawful commands or prohibitions: as, by obstinately refusing obedience to her writs, or contemning a summons from her council to appear before them, or not answering such questions in relation to a matter wherein the interest of the state is concerned, as shall be proposed by the privy council; or refusing to give evidence to a grand jury concerning a crime. *See* Salk. 278; Dyer, 176; Moor, 109; 3 Inst. 179; F. N. B. 85; 1 Cha. Ca. 116.

Contempts against the Queen's title are of two kinds: 1st, denying her title; 2nd, refusing to take the oaths required by law for the support of her government. As to the first point, it is highly criminal to deny the Queen's title, and punishable with fine and imprisonment, such as the court shall think proper, according to the heinousness of the crime and the circumstances of the parties: as, if a man in writing or discourse shall maintain that the Queen is an usurper; or that another has a better title to the crown, &c. *See* Yelv. 107; 2 Roll. 90; Palm. 424. And as to the second point, it is a high contempt to refuse to take the oaths required by law in support of the government. *See* Finch, 141; 2 Inst. 73; 1 Hale, P. C. 64; 2 Keb. 314; 1 Geo. 1, stat. 2, c. 13.

Committing an assault in the Queen's palace is a contempt. *Earl of Devonshire's case*, 1687, 11 *State Trials*, 133.

before the time mentioned in the notice of trial or inquiry, unless short notice of trial or inquiry has been given; in which case, two days' previous notice shall be sufficient, unless otherwise ordered by the court or a judge, or by consent." *See* Trial, Notice of.

CONTINUANCES, Entry of, Abolished.

Reg. Gen. (Pr.) H. T. 1853, r. 31. "No entry of continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings."

CONTINUING Nuisance.

See on Nuisances, *ante*, vol. i. p. 4.

CONTINUING Trespass.

See Trespass.

CONTRA non valentem Agere nulla currit Præscriptio.

Prescription does not run against a Party who is unable to act.[1] Broom's *Max.* 700.

CONTRACTS.

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[1] Thus the Statute of Limitations does not run against parties under disability, and only begins in the case of a debt due from the time when the creditor has a right to institute his suit, because no delay can be imputed to him before that time. *Huggins v. Coates*, 5 Q. B. 432. *Hemp v. Garland*, 4 id. 519. But if the breach of a contract, which forms the ground of action, occurred more than six years before the action, the statute will run, notwithstanding the plaintiff did not discover the injury resulting from the breach till within the six years. *Short v. M'Carthy*, 3 B. & A. 626. *Howell v. Young*, 5 B. & C. 259. *Brown v. Howard*, 2 B. & B. 73. *Bree v. Holbeck*, 2 Dougl. 654. And in trover, the six years run from the conversion, though it was not discovered at the time. *Granger v. George*, 5 B. & C. 149. See *Philpott v. Kelly*, 3 Ad. & E. 106.

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I. Relative to the Creation of Contracts.[1]

[1] A contract is defined to be an agreement entered into by several persons, whereby one becomes bound to another to perform or abstain from doing a particular thing. The contract is either verbal or written. To constitute a parol contract five things must concur: 1st. Persons eligible to contract; 2d. Persons competent to be contracted with; 3d. A valuable consideration; 4th. An article to be contracted for; and, lastly, a mutuality in the parties contracting. When written, another requisite is sometimes essential — a stamp. And written contracts are either not under seal or under seal; the former of which is now principally proposed for our consideration; and as to the latter, *see* vol. i. p. 427, Arbitration; vol. ii. p. 74, Bail; id. p. 504, Bond; *post*, Covenant; Deed; Replevin.

No implied contract can be created where there is an express agreement. *Cutter v. Powell*, 6 T. R. 320. An offer by letter to contract becomes irrevocable the moment the other party accedes to the request by sending off his answer, and it need not reach the former to render it binding on both individuals. *Adams v. Lindsell*, 1 B. & A. 681. *See* 1 Bing. 9; 1 C., M. & R. 699.

Express and implied contracts are matters of evidence. *Seward v. Baker*, 1 T. R. 616. *Webb v. Geddes*, 1 Taunt. 540. Hence an express contract is where the terms of the agreement are explicitly stated. *Dutton v. Poole*, 2 Lev. 211. And even if they do not distinctly appear, they may be supplied by intendment (*Anon.* 1 Lev. 88), provided the agreement be not altogether uncertain. *Please v. Pulfrey*, 1 Sid. 270.

II. Relative to the Stamp.[1]

Implied contracts are such as are not actually made by the party, but are imposed by the law (*Toussaint v. Martinant*, 2 T. R. 100); as, if a surgeon who attends the poor of a parish is allowed to attend casual poor without the intervention of the overseer, the latter shall be considered liable to remunerate him. *Lamb v. Bunce*, 4 M. & S. 275. So if a man orders goods of a tradesman without any agreement as to price, the law implies that the vendee shall pay the vendor the real value. *See* 3 Bl. Com. 445. The law also implies that all persons who undertake a duty or office shall perform it with integrity and skill; and if by want of those qualities any injury accrues to individuals, they have their remedies in damages by action. *See* id. 165.

Contracts consist only of two species, viz. agreements under seal, or parol contracts. The former are called deeds, the latter simple contracts.

Deeds of record are created by a previous judgment or acknowledgment of the party before a proper official person.

To constitute a contract, no precise form or set of words is required. *See* 2 Bl. Com. 443.

An agreement or contract should be expressed in clear and explicit words.

[1] The duties imposed on contracts and agreements have been varied and altered by several statutes. The 55 Geo. 3, c. 184, made the duty 1*l.* when the matter thereof was 20*l.* and upwards, and 7 Vic. c. 21, and 13 & 14 Vic. c. 99, 2*s.* 6*d.* By 23 Vic. c. 15, "any agreement, or any minute or any memorandum of an agreement, made in England or Ireland, under hand only, or made in Scotland without any clause of registration (and not otherwise charged, nor expressly exempted from all duty), when the matter thereof shall be of the value of 25*l.* or upwards, whether the same shall be only evidence of a contract or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto, 6*d.*; and where the same shall contain 2160 words, then for every entire quantity of 1080 words contained therein over and above the first 1080 words, a further progressive duty of 6*d.*: Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*s.*, although the same shall in the whole contain any quantity of words exceeding 2160. *See* 1 C., M. & R. 422; 8 Moore, 6.

A contract containing the words "Inventory hereto annexed," must be stamped so as to include the inventory. *Veal v. Nicholls*, 1 M. & Rob. 248.

Where an agreement is stamped, but a subsequent one is indorsed on the back, which renders it of no force, the latter must be stamped also. *Reed v. Deere*, 7 B. & C. 261.

Where parties contract to pay the costs of a suit rateably, the stamp must be according to the aggregate of the amount. *Limley v. Clarkson*, 1 C. & M. 436.

The 23 Vic. c. 15, exempts from duties "label, slip, or memorandum, containing the heads of insurances, to be made by the corporations of the Royal Exchange and London Assurance of houses and goods from fire, and London Assurance of houses and goods from fire."

"Memorandum or agreement for granting a lease or tack at rack-rent, of any messuage, land, or tenement under the yearly value of 5*l.* But an agreement for a lease of premises, though under 5*l.* per annum, is not within this exception if the interest agreed for be a beneficial one." *Doe d. Hunter v. Boulcot*, 2 Esp. 596.

The statute also exempts "memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant." Hence, an agreement for an assignment of an apprentice from one master to another must be stamped by 23 Geo. 3, c. 58, as it does not come within the exception in the statute relative to the hiring of a servant. *Rex v. the Inhabitants of St. Paul's, Bedford*, 6 T. R. 452. So it exempts "memorandum or agreement made between the master and mariners of any ship or vessel for wages on any voyage coastwise, from port to port in Great Britain." It exempts from duty "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandise." Therefore, a letter written by one who manages another's trade, binding himself to pay a debt contracted for goods therein, need not be stamped. *Mackenzie v. Banks*, 5 T. R. 176. But the primary object of the letter must be a sale of goods. *Smith v. Cator*, 2 B. & A. 778; Peake, 127.

The mere fact of a contract having a seal placed against the signatures of the parties does not necessarily make the contract a deed. A contract, therefore, does not require a deed-stamp merely because a seal is attached to it. *Chanter v. Johnson*, 14 Mee. & W. 408. It falls on the party who seeks to bring an instrument within the Stamp Act to show clearly that it is within it, as no intendment can be made in favour of the liability. *Phillips v. Morrison*, 13 L. J. Ex. 213. *See* further, Deeds; Stamps; and also 13 & 14 Vic. c. 97; 16 & 17 id. c. 59; 17 & 18 id. c. 83.

By the 23 and 24 Vic. c. 111, s. 12, the stamp-duty on an agreement may be denoted by an adhesive stamp in any case where it is capable of being used under the terms and restrictions herein mentioned; and the commissioners are to provide stamps for the purpose. Whenever an adhesive stamp shall be used, every party to the agreement who shall sign the same shall also, at the time of so signing, write upon or across the stamp his name, and the date of the day and year of writing the same, so that the stamp may be appropriated to the instrument, and ef-

III. Who may Contract.[1]

IV. Of the Consideration.

(A) *A Promise without Consideration cannot be the Foundation of a Legal Obligation.*[2]

Tweddle v. Atkinson, 30 L. J. Q. B. 265.

A promise without consideration cannot be the foundation of a legal obligation.[2]

After a marriage between the plaintiff and the daughter of W. G., the father of the plaintiff and W. G., in order to provide a marriage portion, agreed respectively to pay two sums of money to the plaintiff, and they also agreed that the plaintiff should have full power to sue for the said sums of money. The plaintiff was not a party to the agreement. After the deaths of the father

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fectually cancelled, and rendered incapable of being used for any other; and in default thereof the stamp shall be of no avail. And proof of the said writing upon or across the stamp, as hereby required, shall be a necessary part of the evidence of the agreement in any case where such agreement is not stamped with an impressed stamp.

Progressive Duty.—The progressive duty is not chargeable upon any deed or instrument liable to stamp-duty, and duly stamped, which may be put or indorsed upon or annexed to such deed or instrument, or which may be in any manner incorporated with or referred to in and by the same. 13 & 14 Vic. c. 97, s. 11. In computing the length, figures must be counted as words (*Lord Dudley v. Robins*, 3 C. & P. 26), and the attestation clause be included (*Linley v. Clarkson*, 1 C. & M. 436); but not the indorsement of the date, &c. of the instrument. *Winder v. Fearon*, 4 B. & C. 663.

13 & 14 Vic. c. 97, s. 11. "The progressive duties shall not be, or be deemed to have been chargeable upon any instrument, in respect of the quantity of words contained in any other instrument liable to stamp-duty, and duly stamped, put, or indorsed upon, or annexed to the first-mentioned instrument, or in any way incorporated with, or referred to in or by the same." In the case of *The Fishmongers' Company v. Dimsdale*, 22 L. J. C. P. 44, 16 Jur. 799, an agreement duly stamped with 1*l.* 15*s.* was entered into. Some weeks afterwards a memorandum was indorsed upon it, containing certain explanations and further stipulations, amounting to a separate contract. This was stamped with 1*l.*—sufficient in regard to the quantity of words it contained;—but it was contended that, inasmuch as it referred to the original contract, and the whole, together, exceeded 1080 words, it ought to have been stamped with 1*l.* 15*s.*, under the 55 Geo. 3, c. 184. The court, however, was of opinion that the second instrument did not incorporate the first.

Where several persons agree to subscribe to the construction of a dock, one stamp suffices (*Davis v. Williams*, 13 East, 232); and where an agreement between several parties had a stamp for each name but two, which appeared to have been erased, it was holden that it lay on the defendant to show that the erasure took place after it was stamped. *Waddington v. Francis*, 5 Esp. 182.

Where there is only one contract, the plaintiff is entitled to a copy, to have it stamped. *Reid v. Coleman*, 2 C. & M. 456. And where a party to an agreement within the twenty-one days for stamping purloins it, the court will order him to produce a copy and get it stamped. *Rousfield v. Godfrey*, 5 Bing. 418; 2 M. & P. 771.

[1] All persons having legal capacity may enter into a contract or agreement. The party to be charged must not only express his assent, or impliedly undertake that he will be bound, but must be endowed with some degree of reason and judgment to enable him to comprehend the subject. The assent which is requisite to give validity to a promise, necessarily supposes a free, fair, and serious exercise of the reasoning faculty. If the party be absolutely deprived of the use of his understanding, or be deemed by law not to have attained a sufficient degree of mental power, there can be no *aggregatio mentium*, or mutual assent of minds, and, consequently, no binding agreement. A capacity to contract is absolutely necessary, the law protecting those who cannot protect themselves. But the law presumes that there is a full capacity to contract. Chit. Cont. 134. As to contracts by counsel for client, see *Porter v. Cooper*, 1 C., M. & R. 387; 4 Tyr. 456; 6 C. & P. 345; and *ante*, vol. i. p. 438; 2 id. 379.

Where a contract was to be signed by A. and B., A. signs and B. declines, it is for the jury to say whether A. signed on the faith that B. would also. *Latch v. Wedlake*, 3 Per. & D. 499.

An agreement to supply a certain quantity of stone, and a certain other quantity monthly if required, is binding on the representatives of the vendor. *Wentworth v. Cock*, 10 Ad. & E. 42; 2 Per. & D. 251.

[2] A promise is a *nudum pactum* in the absence of either a damage, an advantage, or a mutual agreement. *Cooke v. Oley*, 3 T. R. 653.

Doing that which is beneficial to the defendant is a good consideration (*Yates v. Hall*, 1 T. R. 76); as, a release of an equity of redemption (*Thorpe v. Thorpe*, 1 Ld. Raym. 662; 1 Salk. 171): or the *doing of that which is not beneficial;* as, a promise made in consideration of the cession of an advantage by another party is binding. *Williamson v. Clements*, 1 Taunt. 523. *Pillans v. Van Mierop*, 3 Burr. 1663. So,

of the plaintiff and W. G., the plaintiff brought an action upon the agreement against the executor of W. G., to recover the sum which W. G. had agreed to pay to him.

Wightman, J. "No doubt some old decisions have been cited by Mr. Mellish, which appear to support the proposition that a stranger to the contract and consideration may maintain an action upon the contract if he stand in such a relationship to the contracting party that it may be considered that the contract was made for his benefit, and that therefore he may be considered to be a party. The strongest case is that in which the daughter of the physician might maintain the action upon the promise which was made to her father.

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suffering a third person to do a beneficial act is a good consideration; as, in consideration of a commanding officer giving a soldier leave of absence at the instance of a third person. *Taylor v. Jones*, Ld. Raym. 312.

In reference to the benefit conferred on the promiser sought to be charged, it is not essential that the consideration should be adequate in point of actual value, the law having no means of deciding upon this matter; and it being considered unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties, by not allowing them to be sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract, and the agreement violate no rule of law. It is indeed necessary that the consideration should be of some value, but it is sufficient if it be of a light value only. *Smith v. Smith*, 3 Leon. 88. *Haigh v. Brooks*, 10 Ad. & E. 309, 320; Chit. Cont. 30.

Even in equity, inadequacy of consideration or value is in general, of itself, no ground for impeaching a contract, whether such contract relate to the sale of an estate (*Cole v. Trecothick*, 9 Ves. jun. 246; S. C. 1 Smith, 233. *Western v. Russell*, 3 Ves. & B. 187. *Darley v. Singleton*, Wightw. 29. *Murray v. Palmer*, 2 Sch. & Lef. 488. *Griffith v. Spratley*, 1 Cox, 383); or an annuity (*Floyer v. Shearard*, Amb. 18. *Vernon v. Winstanley*, 2 Sch. & Lef. 395. *Low v. Barchard*, 8 Ves. 133. *Speed v. Phillips*, 3 Anst. 732); or any other subject. *See* 1 Sugd. V. & P. 8. Chitty's Eq. index, "Consideration," 2; 1 Bridg. Eq. D. 359; 10 Ves. 292, 295. *See* 27 L. J. C. P. 219.

The inadequacy of consideration on an agreement for the compromise or abandonment of a doubtful right will not defeat the contract. *Longridge v. Dorville*, 5 B. & A. 117; 1 Ball & B. 34. Adequacy of consideration, when material at law, is a question for the court. *Per Cur.: Mallon v. May*, 11 Mee. & W. 633, 653. *Per Best, C. J.: Horne v. Ashford*, 3 Bing. 327.

If the folly of the contract be extremely gross, the total inadequacy of consideration is a circumstance which, if there be other facts in corroboration, may establish a case for relief, on the ground of fraud. But mere folly and weakness, or want of judgment, will not defeat a contract even in equity. *Milnes v. Cowley*, 8 Price, 620. *Prebble v. Boghurst*, 1 Swanst. 320; Chit. Contr. 20. An action was brought in special assumpsit on an agreement to pay for a horse, a barleycorn, a nail, for every nail in the horse's shoes, and double every nail, which came, there being thirty-two nails, to five hundred quarters of barley. On the trial before *Hyde, J.*, the jury, under his direction, gave the real value of the horse, 8*l.*, as damages; and it is to be collected that the contract was considered valid, for the report states that there was afterwards a motion to the court, in arrest of judgment, for a small fault in the declaration, which was overruled, and the plaintiff had judgment. *James v. Morgan*, B. R. 15 Car. 2; 1 Lev. 111; S. C. 1 Keb. 569.

In an action of assumpsit it was alleged, that in consideration of 26*l.* 6*s.* paid, and 4*l.* 17*s.* 6*d.* to be paid, the defendant promised to deliver two rye corns on the then next Monday, and double in arithmetical progression every succeeding Monday, or every other Monday, for a year, which would have required the delivery of more rye than was grown in the whole year. The court on demurrer seemed to consider the contract good; and *Powell, J.*, said, that although the contract was a foolish one, yet it would hold good in law, and that the defendant ought to pay something for his folly: but no judgment was given, the case being compromised. *Thornborrow v. Whitacre*, 2 Ld. Raym. 1164.

So in respect to the extent of trouble, loss, or obligation, which the promisee has taken upon himself, at the promiser's request, it is immaterial that the detriment or charge thus assumed is, in fact, of the most trifling description, provided it be not utterly worthless in fact and in law; and that, unless it appear that the promisee incurred no detriment whatever, it need not be shown, in order to constitute a good consideration, that a benefit resulted to the promiser from the performance of the stipulated act by the promisee. Chit. Contr. 30.

Thus where, in an action of assumpsit, it appeared that the plaintiff had made a lease to J. S. of lands for life, rendering rent, and that J. S. granted all his estate to the defendant; the rent being in arrear, the plaintiff applied to the defendant for it, who thereupon promised that if the plaintiff could "show him a deed that the rent was due" (which the plaintiff did), the defendant would discharge it; and it was moved in arrest of judgment that there was no con-

(See *Bourn v. Mason*, Vent. 6.) But no modern case can be found to support such a proposition; and, on the contrary, it has always been held that no stranger can take advantage of a contract made with another person. If an action would be against the father-in-law, it would seem also to be against the father. There is no modern case to show that mere nearness of relationship would give a right to sue. It was admitted, that if the plaintiff was a mere stranger he could not maintain the action; and I think that as the marriage took place before the contract was made, no consideration ran from him, and that being no party to the contract he cannot recover." See *Price v. Easton*, 4 B. & A. 434; 1 Nev. & M. 303; 1 Smith's L. C. 67.

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sideration. But it was adjudged for the plaintiff; for, when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the showing of the deed is a cause to avoid suit. *Sir R. Sturlyn v. Albany*, Cro. Eliz. 67. *See* 2 H. Black. 312.

Where the declaration stated that in consideration that plaintiff, at defendant's request, had consented to allow defendant to weigh two boilers of the plaintiff's, the defendant promised to give them up after weighing, in as perfect a condition as they were in at the time of the consent:—It was held, on motion in arrest of judgment, that the consideration was sufficient. *Bainbridge v. Firmstone*, 8 Ad. & E. 843. So, where the declaration stated that in consideration that the plaintiff, at the request of the defendant, had given the latter a certain letter, by means of which he was enabled to end disputes which had arisen between himself and third parties, the defendant promised to give plaintiff 1000*l.*, it was held a sufficient consideration for defendant's promise. *Wilkinson v. Oliveria*, 8 Scott, 461.

A promise to pay the mother of bastard children a yearly allowance in consideration of her continuing to maintain them, is a sufficient consideration to support the promise. *Smith v. Roche*, 28 L. J. C. P. 237. *Crohurst v. Laverack*, 8 Ex. 208.

An agreement not to call on the performance of a deed, and to substitute certain other terms for some of the matters provided for by the deed, is a good consideration for a promise to perform such substituted contract, even although the deed be not thereby released. *Nash v. Armstrong*, 30 L. J. C. P. 286.

The delivery of goods by A. to B. is a good consideration for a promise by B., although A. had already contracted with C. to deliver the goods to his order, and C. had ordered him to deliver to B. *Scotson v. Pegg*, 30 L. J. Ex. 225.

A woman, after the decease of her husband, promised the plaintiff, a creditor, that if he would prove that her husband had owed him 20*l.* she would pay it; and it was held a good consideration, "because it was a trouble and charge to the creditor to prove his debt." *Traver v.* ——, 1 Sid. 57.

The waiver of a tort, by committing which the defendant derived a benefit, although such tort occasioned no real injury to the plaintiff, is a sufficient consideration for a promise by him. *Davis v. Morgan*, 4 B. & C. 8. A declaration, stating the defendant was indebted to the plaintiff on a bill of exchange, and that the plaintiff having lost the bill had, at the defendant's request, given him a bond, acknowledging payment, and conditioned to indemnify him against the bill, shows a good consideration for a promise by the defendant to pay the contents of the bill; for it is a disadvantage to the plaintiff, if it were of no advantage to the defendant, that the bond was executed. *Williamson v. Clements*, 1 Taunt. 523. See *Hansard v. Robinson*, 7 B. & C. 90, 94.

It is a sufficient consideration for a promise of indemnity, that the plaintiff had merely secured by promissory notes and a cognovit the payment of a sum of money to the defendant, as assignee of a bankrupt. *Ikin v. Brook*, 1 B. & Adol. 124.

In order to facilitate the making of an agreement, for which there was a sufficient consideration between the plaintiff and a third person, the defendant, who personally received no benefit from the agreement, became a party thereto; and it was held that as the agreement was such as the plaintiff would not have made, unless the defendant had acceded and become a party to the contract, there was a sufficient consideration for the promise of the latter. *Bailey v. Croft*, 4 Taunt. 611. See *Mocatta v. Francis*, 3 Dougl. 11. Where it appeared from the declaration that one R. wished to get possession of certain deeds which the defendants held, and which they were willing to give up on the plaintiff's accepting and paying certain bills; that the bills were accepted by plaintiff at R's. request, and on his engagement to procure the defendants to deliver up the deeds on payment of the bills; and that, in consideration of the plaintiff accepting the bills, the defendants agreed to deliver the deeds when the bills should be paid:—It was held on demurrer, that the declaration disclosed a sufficient consideration. *Tupper v. Bicknell*, 4 Scott, 462. Payment of a sum immediately by the defendant to the plaintiff, who promises to stay an action, is a good consideration for the promise in an action for unliquidated damages. *Wilkinson v. Byers*, 1 Ad. & E. 106; 3 W. & M. 853. So an agreement in consideration of time being given on a judgment that defendant would surrender a debtor into custody on a *ca. sa.* is not illegal, unless unlawful means are to be used. *Lewis v. Davison*, 4 Mee. & W. 654. And it has been held, that if an agreement

V. Subject-matter of Contract.[1]

VI. The Obligations must be Mutual.[2]

is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other. *Stevens v. Webb*, 7 C. & P. 60.

Giving up letters, which enables defendant to recover a sum of money (*Wilkinson v. Oliveria*, 1 Bing. N. S. 490; 1 Scott, 461); or that, if the plaintiff would pay into defendant's bank a sum of money, he undertook to forward it to plaintiff at a certain place and time, have been held a sufficient consideration. *Shillibeer v. Glyn*, 2 Mee. & W. 143.

The plaintiff, an occupier of lands, having been sued with others by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant, a landowner in the parish, undertook to indemnify him for all costs if he would suffer the defendant to defend the suit in his (the plaintiff's) name: —It was held that there was a sufficient consideration for the defendant's promise. *Adams v. Dansey*, 6 Bing. 506; S. C. 4 M. & P. 245. In an action of debt for fish due for tolls, the plaintiff claimed a right under a custom to take the second best fish out of every boat-load of fish, by way of toll, from fishermen frequenting a certain cove, and landing fish therein. It was proved that the plaintiff and his ancestors had immemorially furnished and maintained a capstan and rope for the use of the fishermen; that in stormy weather boats could not be drawn up from the sea with safety to the crews without them; and that the spot upon which the capstan stood belonged to the plaintiff, although the rest of the cove over which the boats were drawn was the property of a third person: —It was held, as the keeping the capstan and rope in good order and ready for use was a good consideration for the toll, whether the capstan were used or not. *The Earl of Falmouth v. George*, 5 Bing. 286; S. C. 2 M. & P. 457. The forbearance by the plaintiff, at the defendant's request, to enforce a *fieri facias* against the goods of a third person for 60*l.*, is a valid consideration for the defendant's promise to pay the plaintiff 107*l.* in seven days. *Smith v. Algar*, 1 B. & Adol. 603.

A parol promise to pay a bond by instalments, in consideration of the assignee agreeing not to sue after verdict (*Morton v. Burn*, 2 Nev. & P. 297), or where bills were accepted on a deposit of deeds, a promise to return the deeds on the bills being paid, have been held a good consideration. *Tapper v. Bicknell*, 3 Bing. N. S. 710. But a contract to pay a sum of money in consideration of forbearing to present a petition against an M.P. is illegal. *Coppock v. Bower*, 4 Mee. & W. 361.

Where a corporation having threatened opposition to a projected railway, the parties entered into an agreement with the corporation: — *Held*, that the corporation, having received the benefit of such agreement, were bound by it, and that such agreements are not illegal. *Edwards v. Grand Junction Railway Co.* 7 Sim. Ch. 337: affirmed, 1 Mylne & C. 226, 650. Natural love and affection is not a good consideration. *Bret v. J. S. and Wife*, Cro. Eliz. 756.

At common law, any contract is invalid which is in contravention of the precepts of religion or morality, or the rules of public decency. *See* Co. Litt. 206, b.

By statute, any contract is invalid which is prohibited and made unlawful by any statute, though the statute does not say it shall be so.

An action does not lie on an executed consideration, unless the act be done at the request of the party (*Hayes v. Warren*, 2 Stra. 933), either express or implied (1 Roll. Abr. pl. L.): as, if the servant of A. be arrested for a trespass, and J. S., without the request of A., bails the servant, and afterwards A. promises to indemnify him, the promise is void, because the bailing, which was the consideration, was past, and executed before. *See* Dyer, 272. But where the act which forms the consideration will not affect it, as, if A. requests B. to endeavour to procure a pardon for A., and after B. has made such endeavour, A., in consideration thereof, promises to pay him a certain sum of money, this is a good consideration. *See* 1 Roll. Abr. 11, g. pl. 6. So, where a man pays a sum of money, or buys any goods for A. without his knowledge or request, and afterwards A. agrees to the payment, or receives the goods, this is equivalent to a previous request. *See* 1 Saund. 264; Dyer, 272; T. Raym. 260.

Where the contract was, that in consideration that the plaintiff agreed to carry goods for the defendant, the defendant agreed to carry other goods for the plaintiff, the court held that the plaintiff could not maintain an action for work and labour for carrying the goods, but must declare specially. *Bracegirdle v. Hincks*, 9 Ex. 361; 23 L. J. Ex. 128.

[1] If a person undertakes to do a particular thing, the law implies an engagement on his part that it shall be completed in a skilful manner. *Streeter v. Horlock*, 7 Moore, 287. A person who is to be remunerated for his labour according to the discretion of a committee, cannot make a claim unless awarded by the committee. *Taylor v. Brewer*, 1 M. & S. 290. See *Roberts v. Smith*, 28 L. J. Ex. 164; and 1 M. & S. 290; 5 Mee. & W. 114; 1 H. & N. 305; 26 L. J. Ex. 81.

[2] Both the contracting parties must assent. *Cooke v. Oxley*, 3 T. R. 652. *Opy v. Peters*, 2 Lev. 23; 2 Saund. 850.

VII. The Construction of Contracts.[1]

(A) *Admissibility of Extrinsic Evidence to explain Contract.*

HUMPHREY v. DALE, 26 L. J. Q. B. 137.

Evidence of usage of trade is admissible, either to explain an ambiguity in, or to add an implied incident to the contract.

In an action for not accepting linseed oil, it appeared that the defendant had bought the oil, as broker for an undisclosed principal, from the plaintiff's broker. The plaintiff gave in evidence that, according to the usage of the trade, whenever a broker purchased without disclosing the name of his principal, he was liable to be looked to as the purchaser. The admissibility of this evidence being questioned on an application to enter a nonsuit,—

Lord Campbell, C. J. "Parol evidence was clearly admissible to show the cir-

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Harrison v. Austin, 3 Mod. 237; Carth. 38; Camp. 138. *Smith v. Shelberry*, 2 Mod. 34; 1 Freem. 195.

An agreement to remain with the plaintiff two years, to learn her business, without a stipulation to instruct, is not binding, for want of mutuality. *Lees v. Whitcomb*, 5 Bing. 34; 2 M. & P. 96; C. & P. 289.

[1] Although the jury have the right to say what is the meaning of a word in a contract, still the court are entitled to put their construction upon the contract itself. *Hutchinson v. Bowker*, 5 Mee. & W. 535.

The meaning of the word "about" in a contract may be explained by parol evidence. *Cross v. Eglin*, 2 B. & Ad. 106. The words "balance rent" mean the rent due at the date of the agreement. *Edwards v. Bagster*, 2 Mee. & W. 221. Under a contract for "mess pork of S. & Co.," means to be manufactured by S. & Co. *Powell v. Horten*, 2 Bing. N. S. 668.

Where a particular usage prevails in a certain district, a contract made between parties resident within that district, which makes no mention of the usage, must, generally speaking, be taken to have been made subject to and in conformity with such usage; for though usage is not admissible to defeat or contradict a contract, it is admissible to explain or confirm it. *Brown v. Burtinshaw*, 7 D. & R. 603; *post*, Landlord and Tenant.

A tenant agreed to work a coal-mine so long as it was "fairly workable." There were coals in the mine, but of such description that it would not pay to work it:— *Held*, that under the words "fairly workable," a tenant was not bound to work at a dead loss. *Jones v. Shears*, 7 C. & P. 346.

In the cotton trade, the word "bale" means a compressed bale, and is not synonymous with bag. *Taylor v. Briggs*, 2 id. 525; M. & M. 28.

A promise to pay 10*s.* in the pound in consideration of discharging a debtor out of custody, means a promise to pay 10*s.* in the pound on the amount of the debt. *Brown v. Dean*, 5 B. & Adol. 848; 2 Nev. & M. 317. Where a contract is to cease on bankruptcy or insolvency:— *Held*, that insolvency meant an inability to pay just debts. *Parker v. Gossage*, 2 C., M. & R. 617; 1 T. & G. 105. Under a contract to deliver, by a particular ship, fifty tons of oil, if not so much the contract to be void, sending part by that ship and part by another does not satisfy the agreement. *Lovatt v. Hamilton*, 5 Mee. & W. 639.

A contract to plant and keep trees in order for a certain time, means to "weed the ground," as well as "prune the trees;" and in construing such a contract, if ambiguous, the price to be paid will be taken into consideration. *Allen v. Cameron*, 1 C. & M. 832; 3 Tyr. 907.

Parol evidence is admissible to show what is a reasonable time for delivery under a contract. *Ellis v. Thompson*, 3 Mee. & W. 445.

Where the contract was to deliver "all in April, or sooner," and the ship arrived on the 29th of April, and would take four days to unload:— *Held*, that the contract was not complied with. *Cox v. Todd*, 7 D. & R. 131.

A rick of hay was to be paid for within a month, but not to be cut until paid for; in the meantime it was consumed by fire:— *Held*, that it had passed to the vendee, and he must bear the loss. *Tarling v. Baxter*, 6 B. & C. 360; D. & R. 272. But under a contract to take timber by weight at a certain day, if part be delivered, and not the residue, which was damaged before that day, the vendee is not subject to the loss. *Simmons v. Swift*, 5 B. & C. 857; 8 D. & R. 623.

Under a contract to pay in fourteen days, or bill at three months, the defendant (vendee) may elect, and the vendor cannot sue before the fourteen days, even though fraud be alleged. *Strutt v. Smith*, 1 C., M. & R. 312: 4 Tyr. 1019. The plaintiff contracted to sell all his cider, to be manufactured on his premises by the defendant's men:— *Held*, by the usage of the county, the word "cider" meant the juice when expressed, and it was the duty of the defendant to give notice to the Excise. *Studdy v. Sanders*, 5 B. & C. 628; 8 D. & R. 403. In an action for not delivering possession of houses according to contract, it is sufficient to show that the delivery of attornment of the tenants, instead of actual delivery of possession, was the contract. *Palmer v. Temple*, 6 Nev. & M. 159. The words "under a penalty, to be recovered as liquidated damages," mean liquidated damages, and not a penalty. *Leighton v. Wales*, 3 Mee. & W. 545.

cumstances under which the contract was made, and the relation of the plaintiff and the defendants to it, and to each other in respect of it. The question then is, having stated a purchase for a third person as principal, is there evidence on which they themselves can be made liable? Now, neither collateral evidence nor the evidence of a usage of trade is admissible to prove anything which contradicts the tenor of a written contract, but, subject to these conditions, both may be received for certain purposes. To use the language of Mr. Phillips (vol. ii. p. 415, 10th ed.), 'Evidence of usage has been admitted as to contracts relating to transactions of commerce, trade, farming, or other business, for the purpose of defining what would otherwise be indefinite, or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particulars and incidents which, although not mentioned in the contracts, were connected with them, or with the relations growing out of them; and the evidence in such cases is admitted with the view of giving effect, as far as can be done, to the presumed intention of the parties.' Now, here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely, that this was a contract with the defendants, made as brokers. The evidence, indeed, is based on this—the usage can have no operation except on the assumption of their having so acted, and of there having been a contract made with their principal; but the plaintiff by the evidence seeks to show that, according to the usage of the trade, and as those concerned in the trade understand the words used, they imported something more, namely, that if

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A custom of trade, that when timber is sold in bond at a sale by auction in London, the buyer contracts to buy at a price, including the duty payable, and that he may, by giving notice on the following day so to do, elect to take the timber in bond, in which case he is only bound to pay the price less the duty, has been held receivable in evidence. *Clark v. Smallfield*, 4 L. T. (N. S.) 405.

A contract to do a particular thing "directly," does not mean that it must be done *instanter*, but there must be no delay in performance, and such a contract requires a much more speedy fulfilment than a contract to do a thing within a reasonable time. *Duncan v. Topham*, 8 C. B. 225. When goods are sold to be paid for "in cash in one month," the buyer is entitled to delivery of the goods within a reasonable time after the making of the contract, although payment of the price cannot be enforced until after the expiration of the month. *Spartali v. Beneche*, 19 L. J. C. P. 293. Where a railway company had entered into a contract with the plaintiff for the supply of 350,000 railway sleepers within a specified period, to be delivered from time to time in such quantities as should be required, it was held that the company was bound to give the orders, and to take the whole quantity within such specified period. *Great Northern Railway Co. v. Harrison*, 12 C. B. 576; 22 L. J. C. P. 49.

If goods are delivered and received by a party on the terms of "sale or return," he who receives the goods must make his election to return them within a reasonable time, and, if the return be not made, the contract stands as an absolute sale. *Moss v. Sweet*, 20 L. J. Q. B. 167.

But where the damages are not liquidated, the mere mention that a sum is to be paid for non-performance does not make the forfeiture liquidated damages. *Kemble v. Farren*, 6 Bing. 141; 3 M. & P. 425.

Where several parties opened an account jointly with bankers:—*Held* to be a joint and several contract. *Thorpe v. Jackson*, 2 You. & C. 553.

Upon a contract note for timber lying in the docks, at so much per load, to be taken at the dock amount, and paid for in cash, allowing two-and-a-half discount, the duty being paid by the buyer:—*Held*, that the construction of the instrument, whether the discount was to be calculated on the whole sum, including the duty, or only on the price, was properly left to the jury; and they having found that it should be only upon the latter, the court refused a new trial. *Smith v. Blundy*, 1 R. & M. 260.

A contract will be construed to be joint or several, according to the interest of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous, or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if the words are unmistakeably joint, then, although the interest be several, all the parties must be joined in the action; if the words are unmistakeably several, the action must be several, though the interest be joint. *Keightley v. Watson*, 3 Ex. 721. *Pugh v. Stringfield*, 27 L. J. C. P. 34. *Sorsbie v. Park*, 12 Mee. & W. 154. *Foley v. Addenbrook*, 4 Q. B. 197.

Evidence of conversations at the time the written contract was entered into is not admissible if the effect is to vary the written contract. *Hobson v. Brown*, 30 L. J. C. P. 106.

the buying broker did not disclose the name of his principal, it might become a contract with him if the seller pleased. Supposing this incident had been expressed on the face of the note, there would have been no objection to it as affecting the validity of the contract, for the effect of it would only have been that the sale might be treated by the vendor as a sale to the broker, unless he disclosed the name of his principal; if he did that, it remained a sale to the principal—assuming, of course, the broker's authority to bind him. The case would then be analogous to that of the delivery of goods on a contract of 'sale or return,' where the goods pass only conditionally—that is, unless the buyer, within the limit of a reasonable time, if none be mentioned, exercises the option of returning them: if he does, the contract falls to the ground, and is defeated, as if it had never been; if he does not, it takes effect from the time when it was made. Whether this evidence be treated as explaining the language used, or adding a tacitly implied incident to the contract beyond those which are expressed, is not material; in either point of view it will be admissible, unless it labour under the objection of introducing something repugnant or inconsistent with the tenor of the written instrument. And upon consideration of the sense in which that objection must be understood with reference to this question, we think it does not. . . . . To fall within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it unreasonable or inconsistent: thus, to warrant bacon to be 'prime singed,' adding, that is to say, 'slightly tainted' (*Yates v. Pym*, 6 Taunt. 446), or to insure 'all the boats of a ship,' and add, that is to say, 'all not slung on the quarter' (*Blackett v. the Royal Exchange Assurance Company*, 2 C. & J. 244), and other cases of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down, and therefore, when one part only is expressed, it would be unreasonable to suppose that the parties meant to include the other also. Without repeating ourselves, it will be found that the same reasoning applies when the evidence is used to explain a latent ambiguity of language. But here, if all that the plaintiff contends for had been expressed, the defendants would have contracted thus:—'We buy for our principal, but if we do not disclose his name within a reasonable time, we agree that you may treat us as the purchasers;' and it cannot be said that the latter branch is inconsistent with the former, any more than the power to return, subject to which the goods pass, is inconsistent with their passing." [1]

(B) *With Reference to Contracts made Abroad.*[2] *See post*, Foreign Law.

VIII. Effect of Altering Contract.[3] *See ante*, vol. i. p. 308.

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[1] *See* also *Byewater v. Richardson*, 1 Ad. & E. 508. *See ante*, vol. i. p. 320.

[2] A contract which is valid in a foreign state is legal in this country (*Holman and another v. Johnson*, Cowp. 341), and cannot be contravened by a private agreement entered into subsequently (*Hulle v. Heightman*, 4 Esp. 75); and if an action be brought on a contract made in a foreign country, where the liability of the defendant would be different, it lies upon him to show it. 1 D. & R. 41. *See* Story's Conflict of Law, s. 242, &c.

[3] Where a contract during its progress is altered, the contractor is bound to state it will increase the expense. *Lovelock v. King*, M. & Rob. 60.

Where a contract is to be completed by a certain day, a verbal consent to its being done on the following day, even by an agent, binds the principal. *Carpenter v. Blandford*, 8 B. & C. 575.

A contract cannot be altered by a servant without the authority of the master; as, where A. ordered of B. two suits of livery a-year for his coachman, B. supplied one suit of livery, and at the desire of the coachman supplied plain clothes instead of the other:—*Held*, that B. could only recover from A. the price of the livery actually supplied. *Hunter v. Berkeley* (*Countess of*), 7 C. & P. 413.

If there be a contract to convey at a certain price by charter-party, sending a bill of lading with the goods without reference to the charter-party does not vary the price to be paid. *Mitchensen v. Begbie*, 6 Bing. 190; 3 M. & P. 442. *See ante*, Charter-Party, p. 79.

IX. Relative to the Adoption of the Contract.[1]

X. „ Transfer of Contracts.[2] *See* also Chose in Action, *ante*, vol. ii. p. 98.

XI. Apportionment of Contracts where Part is Illegal.[3]

XII. Rescinding Contract.[4]

(A) *Merger of Simple Contract by Acceptance of Contract under Seal.*[5]

XIII. Performance of Contracts.[6]

[1] The adoption of a contract must be the act of a free agent. *Rex v. Inhabitants of Stowmarket*, 9 East, 210. An owner, by suing as for money had and received, to recover the proceeds of an unauthorised sale, does not adopt it. *Hunter v. Prinsep*, 10 East, 378.

[2] Where A. contracts to make machinery for B., and makes part, but being unable to complete it assigns it to C. with B.'s consent, who undertakes to see C. paid, B. is liable to C. *Oldfield v. Lowe*, 9 B. & C. 73. Under a contract to give a definitive answer within a stated time, the party may retract within that time. *Routledge v. Grant*, 4 Bing. 653; 1 M. & P. 717; 3 C. & P. 267. But the defendant saying that he would never pay a farthing is not evidence that he abandoned the contract. *Rees v. Lines*, 8 C. & P. 126. If, however, a contract be abandoned by one party, the other is entitled to compensation, without tendering the subject-matter of the contract. *Planché v. Colburn*, 8 Bing. 14; 1 M. & Scott, 51; 5 C. & P. 58. A. sold certain copies of a work to B., and undertook to sell them to no other person; he, however, sold some to C.; C. afterwards offered to return them to B., who said he was satisfied:—*Held*, he could maintain no action against A. *Benning v. Dove*, 4 C. & P. 427.

[3] It has been held, that if an illegal contract be rescinded as to part, it must be abandoned as to the residue (*Alexander v. Owen*, 1 T. R. 225); but in another case, where part of a contract arose upon a good consideration, and part of it on a bad one, it was holden divisible, and that the party might recover on that which was good. *Robinson v. Bland*, 2 Burr. 1077; S. C. 1 Black. Rep. 234; and *see* 3 T. R. 418; 11 East, 165; 13 id. 87; 15 id. 440; 14 Taunt. 57, 105. So, if a contract be made upon two considerations, and one of them cannot be performed, this will not avoid the contract; and in an action thereon, the damages shall be intended to be wholly given for the good consideration. *See* Cro. Eliz. 143; Sid. 38; 4 Leon. 3; Yelv. 56. So, if in consideration of two things, and one of them be insufficient, the other is valid. *See* Tidd. 38; Cro. Eliz. 848; id. 199. If an agreement is in the alternative, and one branch of the alternative cannot by law be performed, the party is bound to perform the other. *Stevens v. Webb*, 7 C. & P. 60. *See* vol. i. p. 393.

[4] After a contract has been rescinded by one party in consequence of the total non-performance of it by the other party, he may recover back any money which he has paid under it, provided he has done nothing which can be considered as an execution of his part of the contract. A contract once dissolved cannot be revived by a subsequent agreement. *Rex v. Inhabitants of Gresham*, 1 T. R. 101. *See* Addison on Contracts, 1073, 1074.

[5] If after a simple contract has been entered into a contract under seal is executed for the performance of the same act or duty, the simple contract becomes merged in the higher security, and can no longer be enforced. *Price v. Moulton*, 10 C. B. 561; 20 L. J. C. P. 102. If, therefore, a man borrows a sum of money, and gives a promise in writing to repay the money by a day named, and afterwards makes an obligation or bond under seal for the repayment of the same money, the promise in writing under hand is merged and extinguished (*Shack v. Anthony*, 1 M. & S. 573); but a bond or obligation from some third party given as a collateral security, or a transfer or assignment of property under seal as an additional security for the payment of the money, will not merge the simple contract or promise (*Twopenny v. Young*, 3 B. & C. 211; 5 D. & R. 261. *Holmes v. Bell*, 3 Scott, N. R. 479); nor a bond for a debt different from the simple contract debt. *Norfolk Railway Co. v. Macnamara*, 3 Ex. 630.

[6] A contract will be considered performed if all *has been* done that ought to have been expected to have been done. *Honeywood v. Howe*, 2 Chit. Rep. 142.

On a contract to supply a warming apparatus:—*Held*, that although not altogether fit for the purpose, yet, if in any degree so, and capable of being made complete at a further expense, that the plaintiff was entitled to recover the price agreed for, subject to such deduction as it would be necessary to expend to render it complete. *Cutler v. Close*, 5 C. & P. 337.

In assumpsit for goods sold and delivered, the value exceeding 10*l.*, being paper for a room, the plaintiff at the time making a memorandum of the price of the paper, and the charge of putting up; the paper was sent to the house of the defendant, then in the care of a charwoman, who took it in:—*Held*, that the jury were to be satisfied of the order being in fact given by the defendant, and this then was an acceptance by him, with intent to take them as owner. *Smith v. Roll*, 9 C. & P. 696.

A vendor need not be possessed of or have taken steps to procure the article he con-

(A) *Dispensation with Tenders or other Performance on other Side.*[1]

CORT v. THE AMBERGATE, ETC. RAILWAY CO. 17 Q. B. 127; 20 L. J. Q. B. 460.

Per Lord Campbell, C. J. "We think we are justified on principle, and without trenching on any former decision, in holding, that where there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser having accepted and paid for a portion of the goods contracted for gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them." *See* 5 Mee. & W. 377; 4 Ex. Rep. 359.

XIV. EXCUSE FOR NON-PERFORMANCE.[2]

tracted to sell. *Hibblewhite v. M'Morine*, 5 Mee. & W. 462; *contrà Bryan v. Lewis*, 1 R. & M. 386. A contract that the plaintiff will cure all the sheep in a flock or make no charge cannot be enforced unless he cure all. *Bates v. Hudson*, 6 D. & R. 3. A subscriber to a "new" history of a county is not bound to take a mere new edition of an old work. *Paton v. Duncan*, 3 C. & P. 336. Where a third party is to certify that a contract has been performed, such certificate is a condition precedent to the party's right to sue. *Morgan v. Birnie*, 9 Bing. 672; 3 M. & Scott, 76. 16 L. J. Ex. 6; 23 id. 265; 11 Mee. & W. 480. And is so in equity, unless fraud be shown. 22 L. J. Ch. 230. And if goods are to be taken at A.'s valuation, a valuation by his clerk is no performance. *Ess v. Truscott*, 2 Mee. & W. 385. A contract to make an article at a fixed price is binding, though much superior and more expensive than contemplated. *Wilmot v. Smith*, 3 C. & P. 453.

[1] See *Ripley v. M'Clure*, 4 Ex. 345; 18 L. J. Ex. 419. So in *Hochester v. De la Tour* (2 E. & B. 678), the question was whether, if there be an agreement between A. and B., whereby B. engages to employ A. on and from a future day, for a given period of time, to travel with him into a foreign country as courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may before the day refuse to perform the agreement, and break and renounce it so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement, A. having been ready and willing to perform it till it was broken and renounced by B. The court held that he might sue before the day. "The man," said *Lord Campbell, C. J.*, "who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of his option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

Wherever one party has absolutely refused to perform, or has rendered himself incapable of performing his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to treat the contract as rescinded or abandoned, and sue on a *quantum meruit* for the work actually done. *De Bernardy v. Harding*, 8 Ex. 822.

[2] Where the performance of a contract becomes impracticable through the act of God, and there is no provision therein exonerating the contractor from the performance under such circumstances, he must answer for the breach of it in damages (*Shubrick v. Salmond*, 3 Burr. 1637. *Atkinson v. Richie*, 10 East, 530); hence a freighter who covenants generally to load a cargo, and is prevented from so doing by the prevalence of the plague, is liable to his covenant. *Barker v. Hodgson*, 3 M. & S. 267.

The performance of a contract may become impracticable through an act of law. As where a man marries a *feme* who has contracted debts before coverture, he is liable to discharge them in her lifetime; but if she die previously, he will then be discharged from payment of the debts by the act of the law (7 T. R. 350; Cro. Jac. 257; 1 Camp. 189 n); but if an attorney agree to prosecute and defend all suits for A. B. and he be afterwards appointed sheriff, he is not discharged from the performance of the contract, because an attorney is not bound to serve in that office.

Where a contract is to be completed within a certain time, it may be shown that

(A) *Where made on a Sunday.*[1]

(B) *On Account of Performance being Illegal.*[2]

(C) ,, *Insanity.*[3]

(D) *Where Prevented by Conduct of Plaintiff.*[4]

(E) *Impossibility of Performance.*[5]

XV. Relative to the Parties to the Action.[6]

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it could not be completed until after the time through the act of another. *Holme v. Guppy*, 3 Mee. & W. 387. Where work is to be approved of by A., and the defendant refuses to allow the plaintiff to complete the work because it is badly done, A. need not be called to prove that it is badly done. *Vickars v. Cock*, 3 Dowl. 492.

If a contract is to be performed by a stranger, and he refuses, it is no excuse for the non-performance of the agreement, because the contractor has undertaken that the stranger shall comply with his stipulation (*see* 1 Roll. Abr. 452); as, if a contract be that A. B.'s son shall do a certain act for C. D., and the son refuses. *See* 22 Edw. 4, 26, b.

As every man ought to be cognisant of the law, legal ignorance is no excuse for the non-performance of a contract. *Bilbie v. Lumley*, 2 East, 470.

A false representation as to the quantity of work to be done does not avoid the contract, it being the subject of an action of deceit. *Selway v. Fogg*, 5 Mee. & W. 83. See *Pilmore v. Hood*, 7 Dowl. 136; 5 Bing. N. S. 97; 6 Scott, 827.

[1] A contract made on a Sunday is binding, if not in the exercise of the party's ordinary trade. *Bloxsome v. Williams*, 3 B. & C. 232; 5 D. & R. 82.

Where one tradesman gave to another on a Sunday a garantee for the faithful services of a traveller, it was held that in so doing he was not exercising his ordinary calling. *Norton v. Powell*, 4 Man. & G. 42. See *Scarfe v. Morgan*, id. 270. And it has been decided that a recruiting officer enlisting a soldier on a Sunday was not executing his ordinary calling on the Lord's-day. *Walton v. Gavin*, 16 Q. B. 48. *See* Sunday.

[2] No contract can be properly carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal by virtue of some subsequent law; and the non-performance of such contract is not only excusable, but a matter of peremptory obligation on the part of the subject. *Atkinson v. Ritchie*, 10 East, 530. *Barker v. Hodgson*, 3 M. & S. 267.

Thus, on the ground of the illegality of the contract, a party may excuse performance of a contract for the sale of chattels by weights and measures not being the statutory weights and measures (see *Hughes v.* ——, 1 Jur. N. S. 42. *Giles v. Jones*, 24 L. J. Ex. 259); or that the contract operated as a lease for a term exceeding three years in duration, and was not made by deed (*Stratton v. Pettit*, 24 L. J. C. P. 182); or that it was a contract for the doing of an act which would have constituted a public nuisance. *Mayor, &c. of Norwich v. Norfolk Railway Co.* 24 L. J. Q. B. 105.

So it appears to be a defence to a printer's bill, that the book was printed in a printing-press not registered according to the provisions of 39 Geo. 3, c. 79. *Day v. Heming*, 9 W. R. 703; 4 L. T. Q. B. (N. S.) 443.

[3] In the absence of fraud, insanity is no answer to an action on a contract. *Brown v. Joddrell*, M. & M. 105.

[4] Where one of two contracting parties so conducts himself as to hinder the performance of the contract by the other, or to subject the latter to an action at the suit of some third person if he duly perform the contract, no action will lie for the nonperformance. *European & Australian Royal Mail Co. v. the Royal Mail Steam-Packet Co.* 30 L. J. C. P. 247.

[5] If a married man exchange mutual promises of marriage with a single woman, it is no answer to an action by the latter for the nonperformance of this contract to set up the impossibility or illegality of performance, unless the fact of the existing marriage of the promisor was known to the woman at the time of the making of the contract, in which case it would be an illegal and void contract. *Wild v. Harris*, 7 C. B. 1005; 18 L. J. C. P. 297. *Millward v. Littlewood*, 20 L. J. Ex. 2.

Where, upon the marriage of his daughter, the father covenanted with her intended husband to give and bequeath unto her, by deed or will, an equal share with his other children of the property he should die possessed of, and the daughter died in the lifetime of the covenantor, it was held that the liability upon this covenant was discharged by the death of the daughter, as performance had then become impossible by the act of God. *Jones v. How*, 9 C. B. 19; 7 Hare, 267.

[6] The action, whether founded on a contract express or implied, must be brought in the name of the party in whom the legal interest is vested (*Thimblethorpe v. Hardesty*, 7 Mod. 116), or of the person with whom it was actually made. *Skinner v. Stocks*, 4 B. & A. 437. The general rule with respect to contracts not under seal is, that the party from whom the consideration actually proceeds should be made the plaintiff. *Crow v. Rogers*, 1 Stra. 592. *Price v. Easton*, 4 B. & Adol. 433. There must also be some privity between the plaintiff and defendant in an action on contract. *Cobb v.*

(A) *Of the Plaintiffs.*
(B) „ *Defendants.*[1]
XVI. Of the Declaration.
(A) *The Venue.*[2]
(B) *When the Plaintiff should declare Specially, or in* Indebitatus Assumpsit.[3]

Becke, 6 Q. B. 933. *Williams v. Everett*, 14 East, 597. In general, the assignee of a chose in action, or of the beneficial interest in a simple contract, must sue in the name of the assignor; and the agreement generally provides that the assignee will allow his name to be used for that purpose. *See ante*, Chose in Action, p. 98. The case of bills of exchange forms an exception to this rule, the chose in action being assignable by mercantile usage; and in the case of promissory notes the same effect is produced by stat. 3 & 4 Anne, c. 9. And, further, if A. owes B., and B. owes C., and the parties meet and so agree, then C. may sue A. *Tatlock v. Harris*, 3 T. R. 180: *per Buller, J.*

All having a *joint* legal interest in the contract, or in the subject-matter thereof, must join, even although the contract be in terms several, or be entered into by one person on behalf of all. 2 Wms. Saund. 116 (2). But where the interest is several the parties cannot jointly sue in an action of contract. *Brand v. Boulcott*, 3 B. & P. 235. Where a contract may be treated either as joint or several, either may sue or all must join; and where one of several having a joint right of action dies, the survivors are the proper parties to sue. *Jones v. Yates*, 9 B. & C. 538. *See post*, Husband and Wife; Principal and Agent.

[1] In general, the party to be sued on a simple contract is he by whom or for whose benefit it was entered into, and who is either expressly or impliedly liable. *Webb v. Rhodes*, 3 Bing. N. C. 732. An action upon an express contract must therefore, in general, be brought against the party who actually made it (*Trewhella v. Rowe*, 11 East, 435), and upon an implied contract against the party who is subject to the legal liability. *Myrtle v. Beaver*, 1 East, 135. If it is sought to charge several jointly on a verbal contract, it must be on the ground that they contracted jointly, either expressly or impliedly (*Malkin v. Vickerstaff*, 3 B. & A. 89. *Eaden v. Titchmarsh*, 1 Ad. & E. 691), or that the work was done for their joint benefit. *Hellings v. Gregory*, 1 C. & P. 627. *Forster v. Taylor*, 3 Camp. 49. Where the contract is joint and several, either one separately, or all jointly, may be sued. *Lee v. Nixon*, 1 Ad. & E. 207. Broom on Parties, p. 18.

The general rule is, that a liability on a simple contract is not assignable at law: but this rule is subject to qualifications. Thus, where money is remitted by A. to B., for the benefit of C., who is privy to the arrangement, and B. expressly or impliedly assents to hold the money for C., the latter may sue B. *Williams v. Everett*, 14 East, 582. *Wedlake v. Hurley*, 1 C. & J. 83. *See* also Husband and Wife; Principal and Agent.

[2] The venue in this action is transitory, and may be laid in any county, at the election of the plaintiff. In assumpsit in an inferior court, not the promise only, but the consideration also on which such promise is founded, must be laid within the jurisdiction. *Ramsay v. Atkinson*, 1 Lev. 50. S. P. *Whitehead v. Browne*, id. 96. *Drake v. Beare*, id. 104, 105. *Price v. Hill*, id. 137. *Stone v. Waddington*, id. 156. *Hanstip v. Coater*, 2 id. 87. *Wuldock v. Cooper*, 2 Wils. 16. *Higginson v. Martin*, 2 Mod. 197. *Heaven v. Davenport*, 11 id. 365. *Winford v. Powell*, 2 Ld. Raym. 1310.

[3] The action is special when the plaintiff declares upon the original agreement, setting forth the particular language in which it is expressed, or stating the legal effect and operation of it, thus making the special contract the foundation of the suit; as, where he declares upon a bill of exchange, promissory note, policy of insurance, guarantee, wager, warranty, or other similar undertaking. The action is general when the plaintiff, instead of setting out the particular language or effect of the original contract, declares as for a certain debt arising out of the execution of the contract, where that constitutes such a debt, or upon the promise raised or implied by the law upon the execution of the contract, where no specific sum is stipulated to be paid on the execution of it, in which case the law implies that so much is to be paid as shall be reasonably due. Hence it is a rule, that so long as a contract is executory the party must declare specially, but when it is executed he may declare generally.

Special assumpsit is the only form of action that can be sustained on a collateral engagement. *Hard's case*, 1 Salk. 23. *Anon.* Hardr. 486. *Mines v. Sculthorpe*, 2 Camp. 215. Assumpsit does not lie where there is no certain duty or contract express or implied (*Mayor of Northampton v. Ward*, 1 Wils. 107; 2 Stra. 1238); nor, where a party has taken a bond or other higher security. *Toussaint v. Martinnant*, 2 T. R. 104.

Where there was a special agreement, the plaintiff could not formerly proceed to recover his debt under a general *indebitatus assumpsit*. *Weaver v. Boroughs*, 1 Stra. 648. *See* Work and Labour. But it is now settled, that, if he prove a special contract, and the work done be not pursuant

(C) *Statement of Contract.*[1]
(D) „ *Inducement.*[2]
(E) „ *Consideration.*[3]
(F) *Allegation of Request.*[4]
(G) „ *Notice.*[5]

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to the agreement, he may recover on the *quantum meruit*. *Keck's case*, Bull. N. P. 139. And where the terms of a special contract are performed, it raises a duty upon which an *indebitatus assumpsit* will lie. Fitz. 302; Bull. N. P. 139.

A declaration for money paid by A. to B., who is to repay A. on receiving it from C., need not be special. *Platts v. Lean*, 3 C. & P. 561. But upon a written agreement, whereby A. is to do work for B., and C. is to pay, the declaration must be special. *Sweeting v. Asplin*, 7 Mee. & W. 165. Where a contract is rescinded by consent, and money is to be returned, the declaration should be for money had and received. *James v. Cotton*, 7 Bing. 266; 5 M. & P. 26.

Whenever a consideration is executed for which a debt, payable at the time of action, has accrued due, either under an express promise or under one implied by law, the debt may be sued for in an *indebitatus* count. *Clark v. Bulmer*, 11 Mee. & W. 243. *Russell v. Bell*, 10 id. 340. *Beverley v. Lincoln Gas Co.* 6 Ad. & E. 837. And wherever the terms and conditions of any special agreement, not under seal, have been performed and satisfied, so as to leave a mere debt between the parties, the plaintiff may sue in an *indebitatus* count, reserving the contract and the completion thereof to be proved in evidence. *Stone v. Rogers*, 2 Mee. & W. 448. *Prickett v. Badger*, 1 C. B. (N. S.) 96; 26 L. J. C. P. 33. *Clutterbuck v. Coffin*, 3 Man. & G. 842.

Where a special contract has been rescinded, either by mutual consent or by such a breach on one side as entitles the other to rescind, and goods have been provided by one party under the special contract, and retained by the other party after the decision, the value may be recovered in an *indebitatus* count, provided a new contract can be implied to pay the value of the consideration actually received. *Planché v. Colburn*, 8 Bing. 14. *De Bernardy v. Harding*, 22 L. J. Ex. 340. *Simpson v. Lamb*, 25 L. J. C. P. 113; 17 C. B. 103. *Sawburn v. Crunden*, 2 Man. & G. 253. Bullen, Pl. 20.

For the form of common counts, *see post*, Declaration; Pleading.

[1] It is not necessary in declaring on a written contract to state that it was in writing (*Anon.* 2 Salk. 519), though that circumstance must be stated in a plea. But it must be described in the declaration according as it was really made, either in terms or its legal effect.

[2] Where the consideration and promise explain themselves without reference to any collateral matter, they may be stated in the declaration without any inducement, although, when that is not the case, the declaration begins by stating the circumstances under which the contract was made, or to which the consideration or promise refers; as, in an action of assumpsit to pay money in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement need not state the person, time, or place with certainty. *Per Buller, J.*, in *Gwinnit v. Phillips*, 3 T. R. 646. The inducement should, in general, be true and capable of proof. *Lee v. Ayrton*, Peake, N. P. C. 119.

[3] The plaintiff must show in his declaration a legal and sufficient consideration for the promise (*Allen v. Rescous*, 2 Lev. 174); and it must appear to be co-extensive therewith (*Rann v. Hughes*, 7 T. R. 350, n.; 7 Bro. P. C. 556); unless the action be brought for a mere misfeasance, in which case a consideration need not be alleged. *Elsee v. Gatward*, 5 T. R. 143. The whole of the consideration of the defendant's contract must in general be stated. *Clarke v. Gray*, 6 East, 564. See *Bates v. Cort*, 2 B. & C. 474; 3 D. & R. 676. *Whitehead v. Greetham*, 2 Bing. 464.

[4] When the defendant is chargeable upon a collateral promise to do an act upon request, the request must be stated in the declaration, and if traversed proved (*Birks v. Trippet*, 1 Saund. 32); or in any other case, where by the express or implied terms of the contract it is incumbent on the plaintiff to request the defendant to perform his agreement. *Bach v. Owen*, 5 T. R. 409: cited in *Bowdell v. Parsons*, 10 East, 359. Whenever a request is essential, the general averment, "although often requested," is not sufficient. *Wallis v. Scott*, 1 Stra. 88; S. P. *Frampton v. Coulson*, 1 Wils. 33; S. P. *Bach v. Owen*, 5 T. R. 409.

[5] It is a general rule, that where the matter alleged in the declaration lies more properly within the privity and cognisance of the plaintiff than of the defendant, whether it be a condition precedent on which the performance of the latter's promise is altogether to depend, or it be only to regulate the extent to which it is to be performed, it is necessary for the plaintiff to allege that the defendant had notice of the fact; and if the time, place, or other collateral incidents attending it be material, notice of them must be also averred. See *Brable v. Hollywell*, Cro. Eliz. 250; id. 834; 1 Roll. Abr. 464, pl. 21. *Richard v. Carmavel*, Holb. 68; S. C. 1 Roll. Abr. 462; Cro. Jac. 433; 1 Lev. 105. But where the

(H) *Averment of Conditions Precedent.*[1]

(I) *Statement of the Breach.*[2]

(J) „ *Damages.*[3]

XVII. Of the Pleas.

(A) *Effect of General Issue.*

"Non-assumpsit," or "never indebted," do not deny the breach.

Reg. Gen. (Pl.) H. T. 1853, r. 6. "In all actions in simple contract, except as hereinafter is excepted, the plea of non-assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law. *Exempli gratia;* in an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request; and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. To causes of action to which the plea of 'never indebted' is applicable, as provided

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matter alleged does not rest peculiarly within the privity and knowledge of the plaintiff, and the information is as accessible to the defendant as the plaintiff, no notice need be given or averred. Thus, if the defendant's contract to do a thing depend on the performance of an act by a stranger, an allegation of notice need not be introduced in the declaration, for it lies in the defendant's knowledge as much as the plaintiff's (Com. Dig. Pleader, C. 75); or, if a promise be made upon a treaty of marriage by the father of the bridegroom to the father of the bride, to pay the bride so much in case of the husband's death, if she should survive him; the father of the bride dies, then the husband dies, and the administrator of the father declares upon this promise; it is not necessary to give or prove any notice of the death of the husband to his father. Hard. 42. So, in declaring on a promise to pay so much money at the full age of an infant, notice of the infant's attaining his full age need not be given. Hard. 42. The like of the marriage, on the day of the marriage of J. S. So, notice of absolution by the bishop need not be alleged. Where notice is necessary, it ought to appear that it was given in due time, and to a proper person. Com. Dig. Pleader, 6, 73; 1 Leon. 123. It may be, however, useful to observe, that the allegation of a request in general implies notice of everything purported by the request; but, to enable the request to be thus equivalent, it should be a special and not a general one, and attended by all those circumstances which should have accompanied the notice. Cro. Eliz. 250; Cro. Jac. 228.

[1] By the 57th sect. of 15 & 16 Vic. c. 76, it is enacted, that "it shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition or conditions precedent, the performance of which he intends to contest." In a declaration for non-delivery of goods which had been purchased, an averment of performance by the plaintiff of all conditions precedent, and that all things had been done and had happened to entitle the plaintiff to have the goods delivered, was held sufficient, without an averment of his readiness and willingness to pay. *Bentley v. Dawes*, 9 Ex. 666. See *Wheeler v. Bavidge*, id. 668. But it would seem, that if a party relies on a dispensation or excuse of performance he ought to allege it specially. *See* B. & L. pp. 84, 85.

[2] The agreement upon which the suit is instituted creates the liability, the breach of the contract confers the right of action; hence the breach is the foundation of the suit, and must in all cases be stated in the declaration (Com. Dig. Pleader, C. 44). The breach must be co-extensive with the promise (*Wright v. Johnson*, 1 Vent. 64; S. C. 1 Sid. 440; S. P. *Anon.* T. Jones, 125); and if the promise be to do one or the other of two things, the breach must be in the disjunctive (*Gibbons v. Northcott*, 1 Sid. 447; S. P. *Anon.* Hard. 320); but it should not be too general (*Best v. Yates*, 1 Vent. 268–9; S. C. 3 Keb. 449): yet, if the terms of the breach be certain enough to enable the defendant to plead a former recovery, it suffices. *Farrow v. Chevalier*, 1 Salk. 139; S. C. 1 Ld. Raym. 478. See *Head v. Baldry*, 6 Ad. & E. 459; 2 Nev. & P. 217.

[3] The declaration must allege a damage to the plaintiff resulting from the plaintiff's neglect or misconduct. *Dartnall v. Howard*, 4 B. & C. 345; 6 D. & R. 438. As to the measure of damages, *see post*, Damages.

in schedule B (36) of the Common Law Procedure Act, 1852, and to those of a like nature, the plea of non-assumpsit shall be inadmissible; and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises. *Exempli gratia:* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff."

In actions on bills or notes, pleas of 'non-assumpsit,' or "never indebted," are inadmissible.

R. 7. "In all actions upon bills of exchange and promissory notes the plea of 'non-assumpsit' and 'never indebted' shall be inadmissible in such actions, therefore a plea in denial must traverse some matter of fact: *exempli gratia*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour, of the bill or note."

(B) *Pleas in Confession and Avoidance.*[1]

Matters in confession and avoidance must be specially pleaded.

R. 8. "In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded: *exempli gratia*, infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes by way of accom-

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[1] There are now no general issues in the sense in which the term was understood before the pleading rules of H. T. 1832. It formerly amounted to a comprehensive denial of the defendant's liability, under which it was competent for him not only to put the plaintiff to the proof of the whole of his case, but also to raise in answer to it almost every sort of defence on his own part.

Pleas in actions on contract generally deny it, confess, and avoid it, as by payment, release, &c., or by set-off or alleging fraud, &c.

Payment of money into court admits the special count on which it is paid. *Meagher v. Smith*, 1 Nev. & M. 449. *Robinson v. Harman*, 1 Ex. 850. *Perren v. Monmouthshire Railway Co.* 11 C. B. 855. *Archer v. English*, 2 Scott, N. R. 156. But if paid in to the common *indebitatus* counts, it only admits that the money is due under some contract declared upon, but does not admit any particular contract, and it lies on the plaintiff to show which if he claim a larger amount. *Kingham v. Robins*, 5 Mee. & W. 94. *Robinson v. Ward*, 8 Q. B. 920. *Schregen v. Corden*, 11 C. B. 851. *Goff v. Harris*, 5 Man. & G. 573. And where the *indebitatus* counts are joined with special counts, payment into court on the former does not admit allegations in the latter. *Charles v. Branker*, 12 Mee. & W. 743; 1 D. & L. 989. *Gould v. Oliver*, 2 Man. & G. 208; 2 Scott, N. R. 242.

Under a plea of payment into court the defendant cannot show that the order as to the residue of the goods was countermanded. *Stevens v. Ufford*, 7 C. & P. 97.

Fraud.—In an action on an agreement in which fraud is pleaded, the plea is not supported unless some wilful misrepresentation have been made. *Stevens v. Webb*, 7 C. & P. 60. In assumpsit on an agreement to pay to the plaintiff a sum in consideration of the plaintiff using his influence and securing an appointment to the defendant: pleas, alleging, first, that the plaintiff had procured the agreement through fraudulent representation; and, secondly, that the appointment was not, in fact, obtained and secured by the influence of the plaintiff:—*Held*, that upon the first plea the issue was, whether the representation was false to the knowledge of the plaintiff at the time; and on the second, if the jury were satisfied, upon the evidence, that the plaintiff had used such influence as that the situation was secured by it. *Neeley v. Lock*, 8 C. & P. 527.

Plaintiff's agent let a house: plea, fraud and misrepresentation, because a brothel was next door:—*Held* that, to avoid the contract, it must be shown that the agent knew of the fact. *Cornfoot v. Fowke*, 6 Mee. & W. 358. *See* 2 Ex. 538. It is doubtful whether the fraud to defeat a contract must be a moral fraud or a mere false statement made in ignorance will suffice. *See* 22 L. J. C. P. 211; 13 C. B. 777; 24 id. 100; 16 C. B. 597. *See* Forms, B. & L. Pr. 342, and 27 L. J. Ex. 141. The defendant must repudiate the contract, and not take a benefit under it. 5 Mee. & W. 83; 2 Ex. 538; 26 L. J. Q. B. 29.

The illegality of a contract must be pleaded. *Fenwick v. Laycock*, 1 Gale & D. 27.

Where in assumpsit on a contract to sell and deliver best lead at a stated price, the amount to be taken out in prussiate of potash at a stated price, to which only *non-assumpsit* was pleaded:—*Held*, that the defendant could not be allowed to show the inferiority of the lead at the price stated; to do so he should have pleaded the avoid-

modation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded."

Effect of plea of *non est factum.*

R. 10. "In actions on specialties and covenants the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

No plea of *nil debet* is allowed.

R. 11. "The plea of *nil debet* shall not be allowed in any action."

All matters in confession and avoidance must be specially pleaded. But no plea of payment or set-off is necessary, if the plaintiff has given credit for the particulars in his particulars of demand. Otherwise the defendant cannot, without a plea of payment, give evidence of any payments.

R. 12. "All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts."

R. 13. "In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demands, states that he seeks to recover a certain balance without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off."

R. 14. "Payment shall not in any case be given in evidence in reduction of damages for debt, but shall be pleaded in bar."

See Bills and Notes, vol. ii. p. 400; Debt; Equitable Plea; Fraud; Payment; Pleading; Release; Set-off.

(C) *Equitable Defence.*[1]

ance of the contract by non-delivery of the lead according to the contract. *Pegg v. Stead*, 9 C. & P. (N. P.) 637.

A plea of leave and license to an action for breach of contract is bad, the term being inapplicable; but a plea that, before breach, the plaintiff exonerated the defendant, is good. *Dobson v. Espie*, 26 L. J. Ex. 240.

[1] See *post*, Equitable Defence; ss. 83–86, 17 & 18 Vic. c. 125. A plea on equitable grounds must, in order to be valid, disclose matter which would induce a court of equity to grant final relief; if the facts stated would afford a ground for partial relief only, it cannot be sustained. "Where the ground for equitable relief," said *Lord Campbell, C. J.*, "is not a complete bar to any proceedings upon the judgment, and is not, if offered by plea, a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross-equities; we should often be at a loss to determine what are the fit conditions on which the relief should be given; no power is conferred upon us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition; there are no writs of execution against persons or goods adapted to such a judgment, and no one can conjecture what remedy it would give against the lands of the debtor. In short, we think that a plea on equitable grounds is to prevail only where, followed by a common-law judgment, it will do complete and final justice between the parties." *Woodhouse v. Farebrother*, 5 E. & B. 277. See *Mines' Royal Society v. Magnay*, 10 Ex. 489. *Wood v. Copper-Miners' Company*, 17 C. B. 592; 10 Ex. 643. *See* Forms, B. & L. Pr. 331.

An equitable plea, disclosing circumstances in which a court of equity would only restrain the action on terms or conditions, the plea amounting merely to a pending arbitration, will not therefore be allowed. *Wood v. Copper-Miners' Company*, 17 C. B. 561.

In order to constitute a valid plea on equitable grounds that the contract sued upon did not, by mistake, represent the true intent of the parties, the case must be such that a court of equity would grant final relief; if it would be merely ground on which a court of equity would reform the contract, it will not afford a good defence at law. *Perez v. Oleaga*, 11 Ex. 506; 25 L. J. Ex. 65. *Wood v. Dwarris*, 11 Ex. 493. See *Burgoyne v. Cotterell*, 24 L. J. B. C. 28, and 17 C. B. 257.

In an action of account upon the statute 4 Anne, c. 16, s. 27, by one tenant in common against another, for not accounting for rents received, the defendant pleaded that, before the receipt of the rents, the plaintiff and defendant by indenture demised the premises to W. for a term of five hundred years, which term, after divers assignments vested in the defendants, and an equitable replication that the said indenture was a mortgage to secure a sum of money more than sufficient to pay the mortgage debt, was struck out because the court could not order a reconveyance. *Gorely v. Gorely*, 1 H. & N. 144.

In an action against an executor for goods sold, &c., to the testator, the defendant pleaded the statute of limitations; and an equitable replication that the testator bequeathed his property in trust to pay his creditors, was held bad. *Gulliver v. Gulliver*, 1 H. & N. 174. And in the same case, the defendant having pleaded a set-off of

XVIII. Of the Right to Begin.[1] *See* vol. ii. p. 386.
XIX. Relative to the Evidence.[2]
XX. „ Damages. *See post*, Damages.
XXI. „ Costs. *See post*, Costs, p. 287.

CONTRACTIONS.

See Abbreviations, vol. i. p. 43.

CONTRACTORS.

Ellis v. Sheffield Gas Company, 2 E. & B. 67; 23 L. J. Q. B. 42.

Where a contractor is employed to erect a work which is a

This was an action for an injury occasioned by a public nuisance. The defendants, a joint-stock company, having obtained the consent of the Sheffield board of highways, entered into a contract with W., a street paviour, for the laying of the company's main gas-pipes in the streets of Sheffield, although the

money due to the plaintiff for use and occupation by the testator, an equitable replication that the testator by his will directed all sums of money and effects already advanced to the plaintiff (of which the sum set off was due) should be deemed an advancement, was held bad. *Gulliver v. Gulliver*, *supra*. See *Flight v. Gray*, 27 L. J. C. B. 13.

Where a husband sued for money had and received, and the defendant set up by equitable plea that the money was assigned by the wife to him as trustee for her separate use, an equitable replication setting forth a prior assignment to the plaintiff, and stating that the defendant could not object that the plaintiff's title was a mere equitable title, was held good. *Sloper v. Cotterill*, 26 L. J. Q. B. 7. In an action by a wife's trustee against a banker for dividends which the latter had paid over to a third party, pursuant to the plaintiff's power of attorney, it was held that the defendant could not be allowed a plea on equitable grounds that the wife had obtained prepayment of her dividends by means of the power of attorney which she had revoked before the defendant received the dividends. *Clark v. Lawrie*, 26 L. J. Ex. 36.

[1] If the defendant to an action on a contract plead fraud alone, he ought to begin. *Steinkeller v. Newton*, 9 C. & P. 313. But in assumpsit on a building agreement, the issue being, whether it was executed according to the specification:—*Held*, that the plaintiff was to begin. *Smith v. Davies*, 7 id. 307. So, in assumpsit for not delivering hay of certain quality; plea, that defendant tendered hay of that quality, and that plaintiff refused to receive it:—*Held*, that being a traverse of an allegation in the declaration, the issue lay on the plaintiff. *Crowley v. Page*, 7 id. 789. And in assumpsit for breach of contract to do certain work in a workmanlike manner, and issue whether the work was so done:—*Held*, that the plaintiff was to begin. *Amos v. Hughes*, 1 M. & Rob. 464. The test is, whether, if the particular allegation on which the issue arises be struck out of the plea, there will or will not be a defence to the action, and not merely whether the allegation be affirmative or negative. *Mills v. Barber*, 1 Mee. & W. 427. *See ante*, vol. ii. p. 386.

[2] In an action for not completing a contract, the evidence must be co-extensive with the declaration. *Routledge v. Grant*, 4 Bing. 653; 1 M. & P. 717; 3 C. & P. 267.

The rule that parol evidence cannot be received to control a written contract does not preclude parol evidence showing that the party was induced to sign by fraud. *Wright v. Crookes*, 1 Scott, N. S. 685. And it may be shown by parol evidence that a written contract was conditional (*Grounsell v. Lamb*, 1 Mee. & W. 352); or that, after the making of the contract, the parties agreed to extend the time for performance (*Cuff v. Penn*, 1 M. & S. 21); or to show the nature of the original contract. *Broad v. M'Calmar*, 5 Nev. & M. 413. And where the meaning of a mercantile contract is doubtful, the usage of the trade is admissible to explain it. *Bottomley v. Forbes*, 5 Bing. N. S. 121; 8 Scott, 866. *Spicer v. Cooper*, 1 Gale & D. 52. *See* further, as to the admissibility of parol evidence to explain written contracts, vol. i. p. 320, *et seq.* Ambiguity.

Where after the plaintiff had closed his case it appeared by the evidence of the defendant that there was a written contract not produced, not being stamped, the court held that the plaintiff ought not to be nonsuited, for the defendant was bound to substantiate his objection by the production of the instrument, otherwise there would be this inconvenience,—a plaintiff might be nonsuited on the mere assertion of a witness that there was an agreement in writing touching the subject-matter of the action, when, if it were produced, it might appear to be perfectly consistent with the plaintiff's case. *Fielder v. Ray*, 3 M. & P. 659; 6 Bing. 332; 4 C. & P. 61. See *Soulby v. Pickford*, 2 M. & P. 545. Where after a written contract is entered into a verbal order is given for extra work of a perfectly distinct character, the written contract need not be produced (*Reid v. Batte*, M. & M. 413); but generally it ought to be. *Vincent v. Cole*, id. 257; and on its non-production the plaintiff would fail.

nuisance, the employer is responsible if damage is occasioned.[1]

company had no special powers for that purpose. In performance of his contract, Watson employed several men to do the work, who were under the superintendence of himself and his son. The action was brought by a passenger in the street, who was injured by falling over a heap of earth in the street, which had been thrown up by the workmen while digging the trench for the gas-pipes. It was contended that the defendants could not be held responsible, the servants of the contractor having occasioned the mischief.

Lord Campbell, C. J. "The position, in effect, contended for by the defendants' counsel, I think wholly untenable; namely, that where there is a contractor, the employer can in no case be made liable. It seems to me, that if the contractor does that which he is ordered to do it is the act of the employer, and this appears to have been so considered in the cases cited. In those cases nothing was ordered except that which the party giving the order had a right to order, and the contract was to do what was legal, and the employer was held properly not liable for what the contractor did negligently, the relation of master and servant not existing. But here the defendants employ a contractor to do that which was unlawful; and an act done in consequence of such employment is the cause of the injury, for which the action is brought. It is simply the case of persons employing another to do an unlawful act, and a damage to the plaintiff from the doing of such unlawful act."

CONTRIBUTION between Co-Debtors, &c.

See Bail, vol. ii. p. 74; Bankruptcy, id. p. 141; Executor and Administrator; Guarantee; Insurance; Partners and Partnership; Party-wall; Principal and Surety; Salvage; Sheriff; Ship and Shipping; Trustees.

(A) *Contribution between Co-Sureties and Co-Debtors.*[2]

A co-surety or co-debtor is entitled on payment of the debt to a transfer of the securities.[3]

19 & 20 Vic. c. 97, s. 5. "Every person who, being surety for the debt or duty of another, or, being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security, shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty; and such person shall be en-

[1] If the work which the contractor is employed to execute is not itself a nuisance, but by reason of the negligence of his servants, or the improper manner in which they act about it, mischief is occasioned, the contractor, and not the employer, will be responsible. *Allen v. Hayward*, 7 Q. B. 960; 15 L. J. Q. B. 99. *Knight v. Fox*, 5 Ex. 725. *Overton v. Freeman*, 11 C. B. 867; 21 L. J. C. P. 52. *Peachey v. Rowland*, 13 C. B. 182; 22 L. J. C. P. 81. *See* Master and Servant; Principal and Agent.

[2] A co-debtor, who has paid the entire debt in respect of which judgment has been recovered against himself and the other co-debtors, is entitled, under the above section, to an assignment of such judgment; and it is no defence to an action by him against the judgment-creditor for refusing to assign it, to plead that such judgment had become satisfied by payment by such co-debtor, after he had been taken in execution on the judgment. *Batchellor v. Lawrence*, 30 L. J. C. P. 39. *Davies v. Humphreys*, 6 Mee. & W. 153. If the inhabitants in vestry authorise a prosecution, one who pays the costs may sue for contribution. *Holmes v. Williamson*, 6 M. & S. 158. So a party who joins another in a trading voyage may sue for contribution after settlement of the accounts. *Wilson v. Cutting*, 10 Bing. 436; 4 M. & Scott, 268. But a partner cannot sue his co-partner for contribution of money paid in a joint action. *Sadler v. Hickson*, 3 Nev. & M. 258. So one of several stage-coach proprietors cannot sue another for contribution. *Pearson v. Skelton*, 1 Mee. & W. 504; 1 T. & G. 848. But if a party recover damages in case against one of two joint coach-proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened. *Wooley v. Batte*, 2 Car. & P. 417.

Where A. and B. employ an attorney, A. pays the whole, and sues B. for contribution:—*Held*, that B. was entitled to have the attorney's bill taxed. *Grover v. Heath*, 2 Dowl. 285.

[3] If several persons become sureties for the same principal in respect of the same debt or transaction, either jointly or seve-

titled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable."

CONTRIBUTION. None between Wrongdoers.

If a plaintiff, who has recovered judgment against two defendants for a joint trespass, levies the whole damages on one of them, that one has no claim for a moiety of the damages from the other. *Merryweather v. Nixan*, 8 T. R. 186.

The rule that wrongdoers cannot have contribution does not apply to a party who is innocent of the wrong. The rule is, that where two persons knowingly do a wrong, the one cannot recover contribution from the other; but that does not apply where one party misleads another who is innocent. *Adamson v. Jarvis*, 4 Bing. 66; 2 Moore, 241. *See* also 8 T. R. 186; 1 Camp. 343; 3 Ad. & E. 57; 2 C. & P. 417; 1 Mee. & W. 404; 1 Hill, *Torts*, 185; Add. 791.

CONTRIBUTORIES. *See* Joint-Stock Companies' Winding-up Act.

CONUSANCE, Claim of.

I. In what Cases Conusance may be Claimed.[1]
II. By what Court it may be Claimed.[2]
III. „ Persons it may be Claimed.[3]

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rally, or by the same or different contracts, and one of such co-sureties, after the liability of the principal has arisen, pays the debt, or satisfies the whole claim, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them the several proportions of the common liability in an action for money paid by him to their use. Add. *Contr.* 673. *Kemp v. Finden*, 12 Mee. & W. 421.

[1] Claim of conusance is defined to be an intervention by a third person demanding judicature in the cause against the plaintiff who has chosen to commence his action out of the claimant's court. *See* Gilb. C. P. 192; 1 Sellon, ch. 7; Bac. Abr. Courts, D. 3; 2 Wils. 409; Willes, 233. It is in form a question of jurisdiction between the two courts (*see* Fortesc. Rep. 157; 5 Vin. Abr. 588), and not between plaintiff and defendant, as in the case of a plea to the jurisdiction, and therefore it must be demanded by the party entitled to conusance, or by his representative. *See* Fortesc. Rep. 157; 5 Vin. Abr. 588; 12 Mod. 666. A plea to the jurisdiction must be pleaded in person, but a claim of conusance may be made by attorney. *See* 2 Wills. 410; 5 Vin. Abr. 599.

[2] According to 5 Vin. 569, there are three sorts of inferior jurisdictions:— the first to hold pleas, which is merely a concurrent jurisdiction, and can neither be claimed nor pleaded; the second is a general conusance, which, being intended for the benefit of the lord, may be claimed by him, though it cannot be pleaded by the defendant; the third is a conusance of pleas with exclusive words, as where the Queen grants to the city, that the inhabitants shall be sued within the city, and not elsewhere. This being an exempt jurisdiction, may be either claimed or pleaded. *See* Br. Conusance, 51; 1 Blac. Rep. 197; and *Cross v. Smith*, 2 L. Raym. 836; 44 E. 3, 29 b; Co. Litt. 134. Hence it is a general rule, that wherever the defendant can plead to the jurisdiction of the court, there the lord of the franchise may claim conusance, but not *vice versâ*. *See* Gilb. C. P. 193. The privilege of claiming conusance is confined to courts of record. 2 Inst. 140. The Chancellor of the University may claim conusance in a superior court. *Magdalen College case*, 1 Mod. 164. *Turner v. Bates*, 10 Q. B. 292. *Dormer v. Howard*, 9 Jur. 737. And it was allowed in K. B., on a claim made by the Vice-Chancellor of the University of Oxford, during the vacancy of the office of chancellor by death, on behalf the University. *Williams v. Brukenden*, 11 East, 543.

[3] Conusance may be claimed where defendant is in actual custody of the marshal. *Duncombe v. Church*, 1 Salk. 1. But it shall

IV. Time and Manner of Claiming Conusance.[1]

V. Plea of Conusance.[2]

CONVALESCERE.[3]

CONVENTICLE. *See* Meeting-house.

CONVENTIO Privatorum non potest publico Juri derogare. Wing. 201. *An Agreement cannot be in derogation of the Law.* No private contract or agreement, which varies from the ordinary course of law, and sounds in prejudice of the common wealth or common right, shall be deemed good in common law. Wing. p. 746; Co. Inst. p. 1, 166, a. 4; Litt. s. 244.

CONVENTIO vincit Legem. *The express Agreement of parties overcomes* (prevails against) *the Law.* 6 Taunt. 430. Story on Agency, s. 368. As where it is agreed that a lien shall not be lost by a transfer of possession. Id.

CONVENTIO Legi derogat. *Agreement derogates from Law.* Fleta, lib. 4, c. 20, s. 5. See *Modus et conventio vincunt legem.* These maxims are qualified by the preceding. *Conventio privatorum non potest publico juri derogare.* The agreement of private persons cannot derogate from public right; *i. e.* cannot prevent the application of general rules of law, or render valid any contravention of law. Co. Litt. 166, a. Wingate's *Max.* 746. Id. 201. Broom's *Max.* 308. This is also a maxim of the civil law: *Privatorum conventio juri publico non derogat.* Dig. 50, 17, 45, 1.

CONVENTIONAL Obligation. A term used in the Scottish law for a contract.

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not be allowed where the defendant is a stranger, not having any property within the franchise (*see* 22 Ass. c. 3); nor where the action is in Q. B. against the heir on the bond of his ancestor, and where he has no assets within the jurisdiction of the inferior court (see Cro. Jac. 502; 2 Roll. Rep. 48); nor shall it be allowed where the plaintiff is an attorney or an officer of this court, and consequently privileged to sue here (*see* Lit. Rep. 40; 3 Leon, 149); and in the Exchequer of Pleas, a member of either University cannot set his privilege against that of an officer or accountant, or against any person suing as a debtor, this court not being mentioned in their charter of exemption. *See* Hardr. 188. So, a claim of conusance was refused to the University of Oxford, the party, though a member, not being a resident at Oxford. *Hayes v. Long*, 2 Wils. 310.

[1] The claim of conusance must be made after appearance (*Wyld v. Villiers*, Comb. 319); and before plea (*Wells v. Trehern*, Barnes, 346; Prac. Reg. 96. *Kendrick v. Kynaston*, 1 Black. 454). The claim of conusance must be made in person or by attorney (*Parker v. Edwards*, 1 Show. 352; Holt, 181); and when claimed ought to be entered on the roll. The claim is exhibited in court, and a motion is made that it be allowed; then, on the claim and other documents above-mentioned being read, the court grants a rule upon the plaintiff to show cause why the conusance should not be allowed, and upon cause shown, or default made, the court makes the rule absolute, or discharges it, as in ordinary cases. *Brown v. Renouard*, 12 East, 10. *See* 10 Q. B. 292. If conusance be allowed, a transcript of the record is sent to the inferior court, but the record itself remains here; and if the plaintiff afterwards cannot have justice done him in the court below, he may have a re-summons upon the record remaining in this court. *See* 1 Sellon, 257; Tidd, 570. If the claim be allowed, a day is given on the roll for the lord of the franchise to hold his court, and the justices are commanded to be there on that day. *See* Rast. Ent. 129; 2 Wils. 411; 2 Ld. Raym. 836; 12 Mod. 644; 3 Salk. 79. And if a re-summons issue on failure of right in a franchise, the lord of the franchise shall afterwards have conusance of that plea. *See* 5 Vin. Abr. 576.

[2] A plea of conusance being a demand of something *quod sibi debetur*, it must state everything that is to take away the general jurisdiction of the superior court till the instant of making the claim; and if the plea be insufficient in form or substance it may be demurred to, or the facts therein alleged may be traversed by the plaintiff. *See* 2 Wils. 410; Comb. 319; Rast. Ent. 129. *Dormer v. Howard*, 9 Jur. 737.

[3] In civil and old English law, to gain or acquire strength, force, or validity; to become valid. "*Quod ab initio non valet, tractu temporis non convalescet:*"—That which is not valid at the beginning, shall not acquire validity by course of time. Co. Litt. 35 a. This maxim is almost in the same words with that of the civil law: "*Quod ab initio vitiosum est, non potest tractu temporis convalescere.*" Dig. 50, 17, 29.

CONVENTIONS between Nations.[1] *See* Extradition Treaty; Nations, Law of.

CONVERSION. (Lat. *conversio*, from *convertere*, to turn towards.) An appropriation of property, one of the grounds of the action of trover. 3 Bl. Com. 152; 3 Steph. Com. 525. *See* Trover. "Conversion" and "carrying away" are not synonymous nor convertible terms. There may be a conversion without any carrying away.

(A) *What amounts to a.*[2]

[1] Independent nations frequently enter conventions with each other for the furtherance of their mutual interests,—the delivery up of criminals fleeing from justice, &c. Even belligerent states sometimes enter into general conventions, either at the beginning or during the course of the war, respecting the mode in which their necessary intercourse during the war shall be carried on. The subjects of these general conventions are usually conditions to be observed respecting the exchange and redemption of prisoners, passports, safe conduct, flags of truce, and other matters of the like kind. Sometimes, also, agreements to abstain from certain modes of injuring each other, and also with respect to the levying contributions on the invaded territory. 3 Phil. Com. 164.

A British subject claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property during the first French revolution. The governments of England and France entered into a convention respecting compensation to be afforded to British subjects. The English government received all the money agreed upon as the amount of compensation, and undertook to satisfy all the claimants. An act of parliament was passed, declaring how claims were to be preferred and liquidated. A. presented his claim to commissioners appointed under the act, and adopted the modes of proceeding provided by it: but his claim was rejected. After payment of the claims, which were established to the satisfaction of the commissioners, a surplus remained which, in accordance with one of the provisions of the act, was paid over to the Lords of the Treasury. A. proceeded to make his claim afresh under a petition of right:—*Held*, that he had no remedy, except under the provisions of the statute. *The Baron de Bode v. Regina*, 3 H. of L. C. 449.

By s. 1 of 6 & 7 Vic. c. 79, the articles of a convention between her Majesty and the King of the French, concerning the fisheries in the seas between the British islands and France, are declared to have the force of law. By sect. 11, all offences against the articles committed by British subjects are to be determined by justices of the peace, who are also empowered to award compensation for the loss or damage caused by the breach of any of the articles. By art. 25, trawl-boats shall keep at a distance of three miles from boats fishing with drift-nets. By art. 69, all transgressions of the regulations shall in both countries be submitted to the exclusive jurisdiction of the tribunal or magistrates designated by law, who are to settle all differences and decide all contentions between fishermen of the same country, or between fishermen of the two countries. And by art. 7, the trials and judgment shall always take place in a summary manner. By art. 75, this tribunal may award damages for injuries over and above all penalties:—*Held*, that no action could be maintained for an injury caused by a breach of art. 25, as exclusive jurisdiction was given to the tribunal specified in the act. *Marshall v. Nicholls*, 21 L. J. Q. B. 343; 16 Jur. 1155.

[2] This does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property to the plaintiff. *Heyworth v. Hill*, 3 B. & A. 687. Hence, every wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it. Add. *Torts*, 185. Thus, if A. take the horse of B. and ride him, and after that deliver him to B., yet B. may maintain trover against A., for the riding was a conversion, and the re-delivery will not bar the action, although it will go in mitigation of damages. *Countess of Rutland's case*, 1 Roll. Abr. 5 (L.) pl. 1. Assuming to one's self the property and right of disposing of another man's goods is a conversion. *Baldwin v. Cole*, 6 Mod. 212: *per Holt, C. J.* But the mere removal of a chattel, independent of any claim over it, whether in favour of the party himself or any one else, does not amount to a conversion. "Any asportation of a chattel," said *Alderson, B.*, "for the use of the defendant or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel either for the use of himself or another, it is a conversion." And "a simple asportation of a chattel, without any intention of making further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion:" *per Lord Abinger, C. B. Fouldes v. Willoughby*, 8 Mee. & W. 540. See *Heald v. Carey*, 11 C. B. 977. *Thorogood v. Robinson*, 6 Q. B. 769. *Burroughs v. Bayne*, 29 L. J. Ex. 185. Even under a claim of right, it must be restored in a reasonable time. (Id.)

CONVEYANCE. *See* Bankruptcy, vol. ii. p. 141; Bill of Sale, id. p. 194; Bond, id. p. 504; Composition with Creditors, *ante*, p. 155; Contracts, *ante*, p. 193; Copyhold, *post*, p. 223; Lease; Stamps; Vendor and Purchaser; Will.

CONVEYANCER, Certificated.[1]

(A) *Has no Lien.*[2]

(B) *May Sue for his Fees.*[3]

CONVICTION.[4] Indictment for second Offence after former. *See* Indictment; Larceny.

Drawing out part of the liquor in a vessel, and filling it up with water, is a conversion of the liquor. *Richardson v. Atkinson*, 1 Stra. 576. But the mere taking away or destroying a part of the property which remains in the hands of a bailee is not, it seems, such a conversion that the owner may sue in trover for the whole. *Philpott v. Kelley*, 3 Ad. & E. 116.

If A. find the goods of B., and upon demand of the goods answer that he knows not whether B. is the true owner, and therefore refuses to deliver them, this is not evidence of a conversion if A. keep them for the true owner: *per Coke, C. J.* 2 Bulst. 312.

A person is guilty of a conversion who takes the property of one person by assignment from another who has not any authority to dispose of it. *Hurst v. Gwennap*, 2 Star. 306. See *Carlisle v. Garland*, 7 Bing. 298; 2 C. & M. 31. *Robson v. Rolls*, 1 M. & Rob. 239. *M'Combie v. Davies*, 6 East, 538. And it is not necessary in such a case to prove a demand and refusal. *Bloxam v. Hubbard*, 5 East, 407. *See* Hill, *Torts*, 243.

A demand and refusal is not a conversion, unless there is at the time a power to give up the goods; *e. g.* where the goods have been transferred by sale previously to the demand. *Edwards v. Hooper*, 11 Mee. & W. 363. *Sed vide* 29 L. J. Ex. 185.

A servant may be guilty of a conversion, although the act be done by him for the benefit of his master, "for a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another who had himself no authority to dispose of it." *Stephens v. Elwall*, 4 M. & S. 259. See *Cranch v. White*, 1 Bing. N. C. 414. *Davies v. Vernon*, 6 Q. B. 443. But a servant is not, it seems, liable for handing over goods to his employers, unless he has previously received notice of the title of a third party to them. *Powell v. Hoyland*, 6 Ex. 67; and see *Alexander v. Southey*, 5 B. & A. 247.

In equity, money directed to be employed in the purchase of land, and land directed to be turned into money, are in general regarded as that species of property into which they are directed to be converted (2 Sp. 256–258), that is, either immediately or at some given future time, according to circumstances. Id. 258. Where personalty is directed to be converted as soon as conveniently may be, then, as between the executors and the persons interested in the estate, the personalty is to be considered as converted within a year, that being considered as the time within which, in the generality of cases, it may be converted with ordinary diligence. 2 Id. 42, 565, n. c. *See* 4 Kay. L. J. 257; 27 L. J. Ch. 587.

[1] Before the stat. 44 Geo. 3, c. 98, s. 14, there was no direct recognition of certificated conveyancers. They must be members of one of the inns of court, admitted to practise as conveyancers, and must take out an annual certificate, upon which a stamp-duty of 9*l.*, or 6*l.*, according to time and distance, is payable. 16 & 17 Vic. c. 63, sched.

"From and after the 31st of October next after the passing of this act, it shall not be lawful for the Commissioners of Inland Revenue, or any of their officers, to grant or issue in any year, to any person, any such stamped certificate as is required to be taken out by every person who, after the passing of this act, shall become a member of one of the four inns of court in England, practising under the bar as a conveyancer, unless and until he have left with the said commissioners, or their proper officer, an order of the benchers of the inn of court of which the applicant is a member, granting him permission for that year to take out such certificate, or a copy of such order certified under the hand of their treasurer, subtreasurer, or steward: Provided always that this clause shall not extend to any person who at the time of the passing of this act shall be lawfully practising as a certified conveyancer." 23 & 24 Vic. c. 127, s. 34. The Law List is *primâ facie* evidence of party being duly certificated (Id. s. 22) or not.

[2] A certificated conveyancer has no lien on the documents in his hands. *Hollis v. Claridge*, 4 Taunt. 807. *Steadman v. Hockley*, 15 Mee. & W. 553.

[3] A conveyancer may maintain an action for his fees. *Poucher v. Norman*, 3 B. & C. 744; 5 D & R. 648. *Davies v. Sibley*, 6 D. & R. 4. But in *Jenkins v. Slade*, 1 C. & P. 270, it was decided by *Best, C. J.*, *contra*. A contract as to preparing conveyances by an unqualified person is illegal. *Taylor v. Crowland Gas Co.* 18 Jur. 913; 10 Ex. 293.

[4] A conviction is a record of the summary

I. Relative to the Form of the Conviction, p. 218.

(A) *In General*, p. 218.

(B) *In Particular. See* Alehouse and Beershops, *ante*, vol. i. p. 276; Carriers, *ante*, p. 29; Deer; Excise and Customs, Fishery; Game; Highway; Justices of the Peace; Larceny, summary Conviction for; *Mandamus;* Master and Servant; Outlawry; Overseers; Plate; Smuggling; Stage Coach; Thames; Theatres; Vagrant Act.

II. Relative to Drawing up the Conviction, p. 220.

III. „ Defendant's Right to a Copy of the Conviction, p. 220.

proceedings upon any penal statute before one or more justices of the peace, or other persons duly authorised, in a case where the offender has been convicted and sentenced. The examination and punishment of offenders in a summary manner by justices of the peace out of their sessions, and without the intervention of a jury or an open trial, are founded entirely upon a special authority, conferred and regulated by statute. No new offence is cognisable in that manner, unless expressly made so by act of parliament; and all the proceedings under an authority so created must be strictly conformable to the regulations prescribed by the special law in each instance, from which all their force is derived. Their proceedings are matters of record. *See* 1 Salk. 200; 2 Bl. Rep. 1146; 5 D. & R. 558; 3 B. & C. 649. It becomes, therefore, a part of the magistrate's duty to record the proceedings in a formal shape. *See* 2 T. R. 285; 1 Stra. 147. Paley on Convictions. The object in this note will, therefore, be to advert to the particular steps which must be taken previously to the conviction; the peculiar mode in which the instrument itself must be drawn up, and the steps that must be taken to give effect to it where valid, or avert the consequences of it when an informality in law or fact renders such a course available, being the particular subject of inquiry in the act. First, then, it is requisite in all summary proceedings of a penal nature, that there should be an information or complaint, which is the basis of all the subsequent proceedings, and without which it seems that the justice is not authorised in intermeddling (Lofft, 240), except when he is empowered by statute to convict on view. If the information appears to justify the interference of the magistrate, the next step is to give the party accused notice of the accusation, and an opportunity to answer it, by issuing a summons containing the substance of the charge. 1 Salk. 181; 6 Mod. 41; 8 id. 154, n. a. For offences merely arising by penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognisance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but can only summon him to attend, and in default of his appearance proceed *ex-parte*. 4 D. & R. 734; 5 id. 588; S. C. 4 B. & C. 649. The power of enforcing appearance by compulsory means is, however, sometimes supplied by statute, directing the magistrate first to summon the party, and upon default or non-appearance to issue a warrant for his apprehension. *See* 5 Geo. 2, c. 20, s. 7; 6 Geo. 2, c. 29, s. 22; 15 Geo. 2, c. 33, s. 6; 20 Geo. 2, c. 39; 26 Geo. 2, c. 30, s. 17; 31 Geo. 2, c. 29, s. 34; 1 Geo. 4, c. 56, s. 3; 5 Geo. 4, c. 83; 2 D. & R. 600; 2 Bing. 67. If the defendant appear, any irregularity in the summons, or even the want of a summons altogether, becomes immaterial (1 Stra. 261; 2 Mod. 1785; 1 Salk. 383; 2 id. 428; 1 East, 649), except it be in a case where a special form of summons is required by the act, which may not have been complied with. Cowp. 30. Upon the defendant's appearance, he either prays time, or confesses the charge, or denies it and makes defence immediately. In the first case, if he pleads not guilty, and requires time for his defence, and to produce his evidence, it is reasonable, and the law seems to require that the party should be allowed a proper interval for that purpose. 3 Burr. 1786; 1 East, 469. The hearing may either, upon the application of the defendant, or for any other cause, be adjourned to a subsequent day, taking care not to exceed the time, if any be limited by the act, for making the conviction. 3 East, 467. If the charge be confessed, nothing more remains for the magistrate but to pass judgment and impose the penalty. If the defendant appears and denies the charge, or neglects to appear after being duly summoned, the next step is to substantiate the information by testimony. For that purpose, the prosecutor or informer must produce his witnesses to prove the facts alleged. When the case and evidence have been heard on both sides, it remains for the magistrate to convict the party, or to dismiss the complaint, according to his judgment, upon the circumstances. So far it has been deemed advisable to notice those steps which are preliminary to judgment and conviction. A more minute investigation will be postponed until a subsequent part of the work, under the following titles: —Informations; Justices of the Peace, &c. And *see* Paley on Convictions, by Dowling, p. 17, &c.

IV. Relative to the Filing of the Conviction at the Sessions, p. 220.
V. „ the Construction of the Conviction, p. 220.
VI. „ the Consequences of a Conviction, p. 221.
VII. „ Appeals on Conviction, p. 221.
(A) *To Superior Court.* *See* vol. i. p. 381.
VIII. „ the Removal of Convictions by Certiorari, p. 221.
IX. „ the Powers and Duty of the Court convicting, p. 221.

I. Relative to the Form of the Conviction.

(A) *In General.*

A conviction following the form prescribed by the statute is sufficient.

By 11 & 12 Vic. c. 43, s. 17, "in all cases of conviction where no particular form of such conviction is or shall be given by the statute creating the offence regulating the prosecution for the same, and in all cases of conviction upon statutes hitherto passed, whether any particular form of conviction has been therein given or not, it shall be lawful for such justice or justices who shall so convict, to draw up their or his conviction on parchment or on paper, in such one of the forms of conviction in the schedule to this act contained as shall be applicable to such case, or to the like effect.[1] Where an order shall be made, and no particular form of order is or shall be given by the statute giving authority to make such order, and in all cases of orders to be made under the authority of any statutes hitherto passed, whether any particular form of order shall therein be given or not, it shall be lawful for the justice or justices by whom such order is to be made to draw up the same in such one of the forms of order in the schedule to this act contained as may be applicable to such case, or to the like effect."[2]

[1] The following is the form prescribed by the act of

A Conviction for a Penalty to be levied by Distress, and in Default of Distress, Imprisonment.

—— } Be it remembered, that on the
to wit. } day of in the year
of our Lord at in the said [*county*], A. B. was convicted before the undersigned [*one*] of her Majesty's justices of the peace for the said [*county*], for that he the said A. B., &c. [*stating the offence and the time and place when and where committed*]; and I adjudge the said A. B., for the said offence, to forfeit and pay the sum of [*stating the penalty and also the compensation, if any*], to be paid and applied according to law, and also to pay to the said C. D. the sum of for his costs in that behalf; and if the said several sums be not paid forthwith [*or* on or before next],[1] (*) I order that the same be levied by distress and sale of the goods of the said A. B.; and in default of sufficient distress (*), I adjudge the said A. B. to be imprisoned in the [*House of Correction*] at in the said [*county, there to be kept to hard labour*] for the space of unless the said several sums, and all costs and charges of the said distress [*and of the commitment and conveying of the said A. B. to the said House of Correction*], shall be sooner paid.

Given under my hand and seal the day and year first abovementioned, at in the [*county*] aforesaid.

J. S. (L. S.)

[2] By s. 35, all offences relating to the excise, customs, stamps, taxes, and post office, are excluded from the act; so also are proceedings in bastardy, except as to the backing of the warrant for compelling the appearance of the putative father; the backing of warrants of distress; the levying of sums ordered to be paid, and the imprisonment of the defendant for non-payment; and convictions under the Factory Acts are also excluded. *See* further, Justices.

The forms of conviction given in the schedule to 11 & 12 Vict. c. 43, apply however,

[1] *Where the issuing of a distress* warrant would be ruinous to the defendant or his family, or *it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks* (* *), *say*, "that inasmuch as it hath now been made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," *or* "that the said A. B. hath no goods or chattels whereon to levy the said sums by distress, I adjudge" as above, to the end.

it seems, to all cases, and if the conviction be drawn up in the form applicable thereto it is sufficient. Where, therefore, a conviction under the Game Acts adjudged the penalty to be paid, and to be applied according to law, it was upheld, although these acts require one moiety to be paid to the informer and the other to the overseers of the poor, or to some other parish officer appointed by the justice, for the particular overseer or parish officer might be named by word of mouth. *R. v. Hyde*, 21 L. J. M. C. 94, overruling *Ex-parte Hyde*, 15 Jur. 803.

The General Conviction Act (3 Geo. 4, c. 23, s. 2), which authorises one justice to receive the information in all cases where two or more justices are authorised to hear and determine any complaint, does not repeal former statutes expressly requiring more than one justice, &c. to receive the information, and, therefore, a conviction on an information laid before a single commissioner of assessed taxes (not being a justice), under 52 Geo. 3, c. 93, sch. L, rule 13, is bad. *R. v. Griffin*, 8 Q. B. 155. Where the information is before different judges from those who convict, the conviction must state this fact, just as much as where a single justice takes the information. *R. v. Willcock*, 7 Q. B. 317. *See* now 11 and 12 Vic. c. 43.

The conviction must show that the justices had jurisdiction (*Rex v. Taylor*, 7 D. & R. 622), and state the facts constituting the offence, in order that the court may see that the law is duly administered (*Ex-parte Smith*, 3 id. 461); unless the justices convict on their view, then the facts presented to them need not be stated. *Rex v. Wilson*, 3 Nev. & M. 753; 1 Ad. & E. 627. The conviction must not be in the alternative. *Ex-parte Pain*, 5 B. & C. 251. *Rex v. North*, 6 D. & R. 143. Nor contain a blank, as a sum of £ , leaving the blank. *Rex v. Payne*, 4 D. & R. 72. And if a party does not appear, it must be shown that he was summoned personally. *Rex v. Hall*, 6 id. 84. Though a statute gives a form of conviction, the offence must be correctly stated. *Ex-parte Hawkins*, 2 B. & C. 31. And it must be shown that it was one contemplated by the act. *Ex-parte Pain*, *supra*. And it must state the evidence on both sides, if so required by the statute. *Rex in re*, 4 D. & R. 352. But a conviction for an offence under an expired statute, if within a subsequent statute, is good. *Higginbotham*, 9 Dowl. P. C. 200.

In an action against a justice of the peace for false imprisonment, who justified under a conviction under the Vagrant Act (5 Geo. 4, c. 83):—*Held*, that the conviction was not vitiated by the omission of the word "part" before "of Great Britain," in the recital of the title of the statute, as directed in the form given by the act. *Nixon v. Nanney*, 1 Gale & D. 370.

An error in the adjudication of the fact which creates the offence, or the judgment thereon, vitiates the conviction (*Griffiths v. Harries*, 2 Mee. & W. 335); so a conviction charging three distinct offences is bad, as not furnishing any protection against another information. *Newman v. Bendyshe*, 10 Ad. & E. 11; 2 Per. & D. 340. But a conviction under the 6 Geo. 4, for being found "on the high seas" in a ship liable to forfeiture, by a justice, at the first place on land, is good. *In re Nunn*, 8 B. &. C. 644; 3 M. & R. 75.

A conviction against the owner of a boat for plying for hire by his servants, without being qualified, must state he received some of the hire. *Rex v. Taylor*, 2 Chit. Rep. 578.

Where an act is made punishable, and the proof must negative particular circumstances, those circumstances ought to be negatived in the conviction. *Re Turner*, 9 Q. B. 80. Where a section of a statute creates an exception, the party prosecuting need not negative such exceptions. *Re Van Boven*, id. 629. *See* 11 & 12 Vic. c. 43, s. 14. So also if a limitation of time is stated in a subsequent section, it need not be stated in the conviction. *Wray v. Toke*, 12 Q. B. 492. If the offence be taking more or less toll or fee than is authorised by the particular statute, or the resolution of the trustees or other body, it is sufficient if the conviction state the sum taken and the sum legally payable, and negative generally that any less sum than that has been sanctioned by any statute or resolution. *Stamp v. Sweetland*, 8 Q. B. 13.

If a statute give summary proceedings for various offences, a conviction, though formally drawn, will not support a commitment if it leaves it uncertain under which section the conviction took place. *Charter v. Greame*, 13 Q. B. 216. If, however, a summary form be given describing the offence, it is sufficient to follow it. Thus the form given in the Seditious Societies' Act, 39 Geo. 3, c. 79, was held sufficient, although the name of the informer to whom, by the statute, half the penalty was payable, was nowhere stated. *R. v. Johnson*, 8 Q. B. 102. See *Barnes v. White*, 1 C. B. 192; 14 L. J. M. C. 65.

It is not necessary that the form should, in all cases, be followed *verbatim*, the requisite alterations may be made to adapt it more peculiarly to a particular case. *In re Boothroyd*, 15 Mee. & W. 1.

Where, by the statute, the justices have a discretion as to the distribution of the penalty, they must show on the face of the conviction that they have done so; but if no discretion is vested in them, it is sufficient for the conviction to state that the penalty is to go as the law directs. *In re Boothroyd*, 15 Mee. & W. 1. If payment is directed by the conviction to be made to a person other than the person who is by the statute to be the recipient, the conviction will be bad. Accordingly, where, by a conviction for an assault under the 9 Geo. 4, c. 31, the fine was required to be paid to the treasurer of the county, the conviction was held to be bad. *Chaddock v. Wilbraham*, 5 C. B. 645. But a conviction under the 11 Geo. 4, and 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85 (the

II. Relative to the Drawing up of the Conviction.[1]
III. „ Defendant's Right to a Copy of the Conviction.[2]
IV. „ Filing of the Conviction at the Sessions.[3]
V. „ Construction of the Conviction.[4]

Beer Licensing Act), may omit to state to whom the penalty is to be paid, and the addition of an award by the justices how the fine is to be disposed of after payment is no ground of objection. *Wray v. Toke*, 12 Q. B. 492.

A conviction under the 6 Geo. 4, c. 129, s. 3, stating the offence to be that "one T. P. unlawfully, by threats, endeavoured to force one W. J. to depart from his hiring to Messrs. P. & Co.," thus following the words of the act, is sufficient. *Ex-parte Perham*, 29 L. J. M. C. 31.

Upon an information for keeping a betting-house on divers days and times, a conviction for keeping it on a day not specified is good. *Onley v. Gee*, 30 L. J. M. C. 222.

Where an act creating offences is in part repealed, and the residue is to be construed as one act with the repealing act, by which new offences are created, a clause in such subsequent act, providing that all proceedings for penalties shall be in the name of the attorney-general, does not apply to proceedings for offences created by the first act. *Reg. v. Johnson*, 8 Q. B. 102.

A conviction, in other respects sufficient, is not vitiated by the detainer of the defendant for an unreasonable time before the hearing of the information. *Re Van Boven*, 9 Q. B. 629; 16 L. J. M. C. 4.

In an action of trespass for pulling down a cottage, to which the defendant pleaded not guilty by statute, it appeared that the plaintiff was convicted by three justices under stat. 5 & 6 Wm. 4, c. 50, for an encroachment on a highway. The defendant, who was surveyor of the highways, pulled down the plaintiff's cottage, which was what the conviction referred to, but which was not in fact an encroachment within the act. No warrant issued directing the defendant to do the act:—*Held*, that the 5 & 6 Wm. 4, c. 50, s. 69, requires the surveyor to execute a conviction under that act by pulling down the encroachment, though there is no warrant, and, consequently, that the conviction, though not itself correct, was a defence to this action, as defendant, was shown to be in the position of a person bound to execute the judgment of a tribunal of competent jurisdiction. *Keane v. Reynolds*, 2 E. & B. 748.

[1] Upon the justices determining upon convicting the defendant, or of making an order upon him, they are required by 11 & 12 Vic. c. 43, s. 14, to make a minute or memorandum thereof, and the conviction or order itself is afterwards to be drawn up by them in proper form, under hand and seal, and to be lodged by them with the clerk of the peace, to be by him filed among the records of the general quarter sessions of the peace.

If a valid subsisting conviction be proved at the trial, which appears by the date to warrant the act done under it, the court will not inquire into the time when it was actually drawn up. *Massey v. Johnson*, 12 East, 82. *Gray v. Cookson*, 16 id. 20; S. P. 10 Mod. 382. And, indeed, even after the magistrate has delivered to the defendant a copy of a conviction, as that upon which the subsequent proceedings have been founded, he is not thereby precluded from drawing up and returning a conviction in a more formal shape, which is to be taken as the only authentic record of the proceedings. *Rex v. Barker*, 1 East, 187. *Massey v. Johnson*, 12 id. 67. *Rex v. Allen*, 15 id. 333. *Charter v. Greame*, 13 Q. B. 216; 19 L. J. M. C. 73.

A conviction need not be on parchment. *Wray v. Toke*, 12 Q. B. 492; and *see* 11 & 12 Vic. c. 43, s. 17.

[2] The defendant is entitled to have a copy of the conviction, if it be necessary to his defence against an action for the same offence. *Rex v. Midlam*, 3 Burr. 1720.

[3] A magistrate should, in all cases, return a conviction to the sessions. *Rex v. Eaton*, 2 T. R. 285.

In an action against a magistrate for false imprisonment:—*Held*, that a conviction filed at the quarter sessions was no justification of the defendant, where it appeared to have been framed upon a different statute from that of the commitment. *Rogers v. Jones*, 1 R. & M. 129.

[4] The old rule, that the court will be astute in discovering defects in convictions, is now exploded. *Rex v. Thompson*, 2 T. R. 18. There are not, however, wanting numerous authorities establishing the reverse position. *Rex v. Little*, 1 Burr. 613. *Rex v. Green*, Cald. 391. *Rex v. Chandler*, 1 Salk. 378; S. P. *Rex v. Peckham*, Comb. 439; S. P. *Rex v. Corden*, 4 Burr. 2281.

By the 11 & 12 Vic. c. 43, s. 18, costs specified in convictions may be recovered in the same manner and under the same warrant as any penalty adjudged to be paid by such conviction is recoverable, but this is limited to cases in which the proceeding is a mode of recovering the penalty, and, therefore, where the prior statute (*e. g.* the Lord's Day Act, 29 Car. 2, c. 7), authorises the defendant being put in the stocks in case of non-payment of the penalty, the warrant cannot now direct him to be put in the stocks for non-payment of the costs. *R. v. Barton*, 13 Q. B. 393; 20 L. J. M. C. 1.

If the conviction do not adjudge costs, a distress cannot issue for costs. See *Leary v. Patrick*, 15 Q. B. 266; 19 L. J. M. C. 211.

VI. Relative to the Consequences of a Conviction.[1]

VII. „ Appeals on Conviction.[2]

(A) *Appeal to Superior Court from Summary Conviction. See* vol. i. pp. 381, 382, 383.

VIII. Relative to the Removal of by Certiorari.[3] *See ante*, Certiorari, p. 62.

IX. Relative to the Powers and Duty of the Court convicting.[4]

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[1] Two parties jointly convicted of an assault cannot be fined jointly. *Morgan v. Brown*, 6 Nev. & M. 57.

The mode of enforcing the payment of pecuniary fines is usually by distress or imprisonment. The power of proceeding compulsorily is, however, entirely derived from statute. *See* Paley on Convictions, by Dowling, p. 336, and 236, n. And even this power may be suspended by appeal. *Wootton v. Harvey*, 6 East, 75. But if such appeal does not take place, the justice usually forthwith issues his warrant. *Rex v. Wyatt*, 2 Ld. Raym. 1189; 1 Salk. 380; Fortesc. 127; 11 Mod. 54. In default of distress, the offender may be committed. *Hill v. Bateman*, 1 Stra. 710.

[2] An appeal against a conviction is by no means a matter of common right; it will not lie unless given by the express words of some statute. *Rex v. Hanson*, 4 B. & A. 519. There is no general statute upon the subject; the appeal, when given, is to the sessions of the county or borough stated in the margin of the conviction, except that, in case of conviction by the magistrates of a borough to which the Crown has not granted a separate quarter sessions, the appeal must be to the quarter sessions of the county in which such borough is situate. *See* 5 & 6 Wm. 4, c. 76, s. 111. Whether it is to be to the next sessions after the conviction, or within a certain time after the conviction, or within what other time it must be lodged, must depend entirely upon the wording of the act of parliament by which the appeal is given.

On an appeal against a conviction the sessions may affirm the conviction, subject to a case, and afterwards award punishment. *Rex v. Justices of Warwickshire*, 4 Nev. & M. 370. A party was convicted under the 5 Geo. 4, c. 83, as a rogue and vagabond, for indecently exposing his person. A notice of appeal that he was not guilty of the offence is too general and indefinite to satisfy the act. *Rex v. Justices of Newcastle-upon-Tyne*, 1 B. & Adol. 933.

Under a conviction by two justices, under 6 Geo. 4 (Alehouses), notice of appeal must be given to both the justices. *Regina v. Justices of Bedfordshire*, 3 Per. & D. 21. *See* Quarter Sessions.

[3] In all cases where the certiorari is not taken away by statute, a summary conviction by a magistrate may be removed by it into the Court of Queen's Bench, for the purpose of having it quashed for any errors appearing upon the face of it; but where it appears by the conviction that the defendant appeared before the magistrate and pleaded, and the merits have been tried, and that the defendant has not appealed against the conviction (where the appeal is allowed), or, if appealed against, such conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. 3 Geo. 4, c. 23, s. 3. This statute, however, does not cure the omission of a circumstance necessary to constitute the offence. *Rex v. Walsh*, 3 Nev. & M. 632.

If a conviction be obtained by fraud, it may in all cases be removed by certiorari. It has been doubted whether the validity of a conviction, the right to remove which by certiorari has been taken away by statutes, can be questioned, on motion for a habeas corpus, in a case where the commitment was not before the court. *Re Boothroyd*, 15 Mee. & W. 1. But see *R. v. Chaney*, 6 Dowl. 281. *R. v. Martin*, 2 Q. B. 1037.

Where an informal or imperfect conviction has been filed on record at the sessions in support of a commitment, a second conviction, obviating the fault of the first, may be filed, provided nothing equivalent to a quashing of the first conviction has previously taken place. *Charter v. Greame*, 13 Q. B. 216; 19 L. J. M. C. 73.

As to the practice where the defendant is in prison, see *Reg. v. Lord*, 12 Q. B. 757; *ante*, p. 63.

[4] The court cannot compel a defendant to go before a master instead of passing judgment. *Rex v. Richardson*, 6 D. & R. 141. An indemnity to justices for convicting is illegal. *Selwood v. Mount*, 9 C. & P. 75.

It may be necessary to mention, that the room or place in which the magistrate sits to hear and determine a matter of complaint in this summary way, is in law a public and open court, to which the public generally may have access; and the party accused shall be admitted to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

Magistrates ought not to take an indemnity. It is a bad practice, as it has the effect of enabling them more safely to decide in favour of a party who is able to give them an indemnity than of one who cannot do so. *Selwood v. Mount*, 9 Car. & P. 75: *per Alderson, B.*

A party convicted in a penalty under a statute awarding imprisonment if the penalty were not paid, refused to pay, and threatened to proceed against the justices

CONVICTS. Forfeiture of Goods to the Crown.[1] *See* Attainder, vol. ii. p. 1.

CONVOY. *See* Charter-party, *ante*, p. 79 ; Insurance ; Ship and Shipping.

COPARCENER. *See* Ejectment ; Parceners.

COPARCENARY, Estate in.[2]

COPULATIO verborum indicat acceptionem in eodem sensu. Broom's *Max.* 450. *The coupling of Words together shows that they are to be understood in the same sense.*

COPY of Document, when admissible. *See* Evidence ; Public Records ; Registers.

(A) *Different Kinds of Copies.*[3]

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under the Habeas Corpus Act, 31 Car. 2, c. 2, s. 6, if they committed him, alleging that he had before been committed under a conviction for the same offence, and discharged on habeas corpus. On motion for a *mandamus* to the justices to issue a warrant of commitment, the court refused to interfere, although it was suggested that the former discharge had been for a formal defect. *Re Williams*, 9 Q. B. 976.

[1] Persons convicted of treason or felony forfeit on such conviction the whole of their goods and chattels to the Crown; and nothing but a *bonâ fide* alienation for a valuable consideration, made previously to conviction, can avert such forfeiture. *Perkins v. Bradley*, 1 Hare, 219; 3 Rep. 826; 4 Bl. Com. 387. All personal property which accrues to a felon during his term of penal servitude is forfeited to the Crown (*Roberts v. Walker*, 1 Russ. & Mylne, 752). But at the expiration of his sentence his civil rights are restored. Therefore, a mere contingent interest will not be forfeited if it do not vest until the expiration of the sentence. *Stokes v. Holden*, 1 Keen, 145. *See* 13 & 14 Vic. c. 60, s. 46, as to where a party is trustee or mortgagee, and *post*, Forfeiture, and 2 K. & J. 623.

[2] An estate in coparcenary by the common law is an estate in fee or in tail, held by two or more females, to whom it has descended, or by the representatives of such females, in an uninterrupted course of descent from them, whether such representatives are male or female. Smith's *Real and Pers. Pro.* 227. Parceners always claim by descent; and hence it follows, that if two sisters purchase land to hold to them and their heirs, they are not parceners but joint tenants, and that no estates can be held in coparcenary but estates of inheritance. 2 Bl. Com. 188; Litt. s. 254. Parceners have a unity but not an entirety of interest as between themselves. They are properly entitled each to the whole of a distinct moiety, and therefore there is no *jus accrescendi* or right of survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the land continues in a course of descent and united in possession, so long are the tenants thereof called coparceners, or, for brevity, parceners, and make but one heir, whether they be male or female, or collaterally related to the person from whom the estate first descended in coparcenary. Sm. *Real and Pers. Pro.* 227. Besides parceners by the common law, there are also parceners by particular custom, where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. 2 Bl. Com. 187; Robinson, by Norwood; Sandy's Gavelkind.

Courtesy and dower are incident to estates held in coparcenary, as no survivorship takes place; but in such a case dower can only be assigned in common. 2 Cruise, T. 19, s. 10. Coparceners may convey to each other. An estate in coparcenary may be dissolved: 1. By partition, which disunites the possession, converting the estate into two or more estates in severalty. 2. By alienation, which disunites the title, and may disunite the interest, changing the estate into a tenancy in common; or, 3, by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty. 2 Bl. Com. 189, 191.

[3] The principal sort of copies used for the proof of documents are:—(1.) Exemplifications under the Great Seal. (2.) Exemplifications under the seal of the court where the record is. (3.) Office copies, *i.e.* copies made by an officer appointed by law for that purpose. (4.) Examined copies, *i.e.* a copy sworn to be a true copy by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. It does not seem necessary to call both the persons who were engaged in the examination, neither is it necessary that they should have alternately read and inspected the copy, for it ought not to be presumed that any person would wilfully misread a record. *Rolfe v. Dart*, 2 Taunt. 52. *Giles v. Hill*, 1 Camp. 471; but see *Slane Peerage case*, 5 Clark & Fin. 42. (5.) Copies signed and certified as true by the officer in whose custody the original is. (6.) Photographic copies, Best, Evid. 602.

By the 14 & 15 Vic. c. 99, s. 14, "whenever any public book or document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which ren-

(B) *Copies admissible as Secondary Evidence.*[1]

COPYHOLD, Estate of. *See* Bail, vol. ii. p. 74; Bankruptcy, id. p. 141; Land Tax; Mortgage; Remainder; Reversion; Settlement; Will.

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ders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer in whose custody the original is intrusted."

[1] Copies are admitted as secondary evidence where an excuse, such as the law deems sufficient, is given for the non-production of the primary. *See post*, Evidence.

Where a notice to produce a deed has been given and the deed is not produced, it was formerly held that a counterpart if in existence is the next best evidence; if there be no counterpart, an examined copy; if no examined copy, parol evidence. Bull. N. P. 254. *R. v. Castleton*, 6 T. R. 236. It has, however, been since ruled, that there are no degrees in secondary evidence, and that where secondary evidence of a document is admissible at all, parol proof of it is sufficient, although it may appear that an attested copy or counterpart, or other better secondary proof, is in existence. *Doe v. Ross*, 7 Mee. & W. 102. *Hall v. Ball*, 3 Man. & G. 243. But where such superior secondary evidence is kept back, it is a fact from which a jury may sometimes presume that it would be adverse to the party withholding it. *Per Lord Abinger, C. B.: Doe v. Ross, supra.*

The copy of a copy is not secondary evidence of the original. *Everingham v. Roundell*, 2 M. & Rob. 138.

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I. Of the Circumstances necessary to a Copyhold Estate.[1]

II. Relative to the Nature of Copyhold Estates.[2]

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[1] There are four circumstances necessary to the existence of a copyhold. In the first place, there should be a manor. *Bradshaw v. Lawson*, 4 T. R. 443. It is also necessary that there should be a court (*see* 1 Inst. 58 a.; 4 Rep. 266; Gibb. Ten. 210; Cro. Eliz. 102, 252, 395, 442, 661; Co. Copy. s. 45; Co. Cop. Sup. s. 13), the copyholder having no other evidence of his title than the rolls of the court. *Rex v. Lucas*, 10 East, 235. *Rex v. Shelly*, 3 T. R. 141. The third circumstance necessary to the existence of a copyhold is, that the thing granted be parcel of the manor. *Winter v. Lovedurr*, 12 Mod. 147; 2 Salk. 537; Comb. 37; Carth. 427; 5 Mod. 244. *Brittel v. Bade*, 1 Ld. Raym. 43; 1 Salk. 185. *Crowther v. Oldfield*, 1 Ld. Raym. 1225. The fourth circumstance necessary to the existence of a copyhold is, that the lands, &c. have been demised, or been demisable, by copy from time immemorial (*Roe v. Newman*, 2 Wils. 125. *Cowper's case*, 6 Mod. 90); for this tenure derives its whole force from custom, so that no new copyhold can be created at this day, as nothing can be now granted by copy of court-roll which was not granted or grantable by that tenure before. *Rex v. the Inhabitants of Hornchurch*, 2 B. & A. 189.

[2] A copyhold estate may be described to be a parcel of the demesnes of a manor held at the will of the lord, according to the custom of the manor, by a grant from the lord, and an admittance of the tenant entered on the rolls of the manor-court. Littleton, p. 73. In id. p. 73, there is also a species of copyhold which is held according to the custom of the manor, but not at the will of the lord, called a free copyhold, or customary freehold. It was formerly held that the freehold of these estates was in the tenant, from which they acquired the appellation of customary freeholds; but it is now fully settled that the freehold is in the lord (*Stevenson v. Hill*, 3 Burr. 1273. *Smith v. Pope*, Comb. 387. *Gale v. Noble*, Carth. 432. *Rogers v. Bradshaw*, 2 Vent. 144), being, in truth, but a superior species of copyhold. *Doe d. Reay v. Huntington*, 4 East, 270. *Brown v. Rawlins*, 7 id. 409; 3 Smith's Rep. 254. *See* Scriv. Cop.; Watk. Cop.

Copyhold rents may be reserved without distinguishing in respect of the particular premises for which each is payable. *Doe d. Leach v. Whittaker*, 3 Nev. & M. 225; 5 B. & Adol. 509.

The 55 Geo. 3, c. 192, applies to lands held by copy of court-roll, according to the custom of the manor, as copyhold. *Doe d. Edmunds v. Llewellin*, Ex. 2 C., M. & R. 503.

Copyhold is within the meaning of the words "lands of any tenure," in the 3 & 4

III. When Copyhold Estates do or do not become Freehold.[1]

IV. Relative to the Creation and Grant of Copyholds.[2]

Doe d. Foster v. Scott, 4 B. & C. 706 ; 7 D. & R. 190.

A grant of copyhold lands was made to P. C. for her life and the life of T. E., and the life of the survivor. By another grant the reversion was given to M. C., B. C., &c. for their lives, and the life of the longest liver. P. C. died, having devised the lands to T. E., who entered and held them more than twenty years. M. C. and B. C. now brought an ejectment to gain the possession.

Copyholds are created by grant, and therefore whether a general or special oc-

Wm. 4, c. 74, s. 77 (*Ex-parte Shirley*, 7 Dowl. 258), by which it is enacted, "that it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole;* save and except that no disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this act shall not extend to lands held by copy of court-roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor, of which the lands may be parcel."

A corporation cannot hold land by copy of court-roll. *Attorney-General v. Lewin*, 1 Coop. 51.

[1] An allotment of copy after continued possession becomes freehold. *Doe d. Sweeting v. Hellard*, 9 B. & C. 789. By the 4 & 5 Vic. c. 35, *post*, p. 232, all copyholds may be made freeholds by consent, and on the terms stated in the statute.

[2] It is a general rule that copyholds cannot be created at the present day (*Townley v. Gibson*, 2 T. R. 705), unless by the transcendent power of an act of parliament. It has been therefore decided, that a copyhold cannot be created by operation of law, nor by act of the party. *Revell v. Jodrell*, 2 T. R. 415; 1 Scri. Cop. 2, 46.

The 15 Hen. 8, c. 13, enacted, "that the king's manors of Granges, &c. in the county of Norfolk, formerly part of the possessions of the abbey or priory of Walsingham, should and might be granted by copy of court-roll in fee-simple, or for term of life or lives by the stewards of the said manors, their under-stewards or deputies, for such rents, services, fines, heriots, and customs, as in the said copies should be specified; which copies should be good against the king, his heirs, successors, and assigns." *See* also 37 Hen. 8, c. 2, enacting, "that so much of Hounslow Heath as was the king's inheritance, and was meet for tillage, pasture, meadow, or other several ground, should be of the nature and condition of copyhold land; or the same might be letten by the steward of the manor at will, or for twenty-one years, which lessee should or might improve it." On this ground the copyhold must be granted on the usual services and returns. Sir Edward Coke lays it down in express terms, that the most trivial variation must not be made from the ancient services, else the heir may avoid the grant; nay, if the ancient rent, says he, were expressly reserved in gold, and on the new grant it be reserved in silver, it would be fatal; or if two copyholds escheat, the one usually demised at 20*s.* rent, and the other at 10*s.*, and the lord grant them both rendering 30*s.*, it would not be good. Co. Cop. s. 41; 2 Bl. Com. 370; ch. 22; Gilb. Ten. 148; 2 Roll. Rep. 236; Cro. Eliz. 699. The creation of a tenancy in common in copyholds does not destroy the entirety of the tenement. *Holloway v. Berkeley*, 6 B. & C. 2.

The creation of a tenure somewhat similar to copyholds appears to have been attempted by the society of New Inn in granting out their chambers for lives. It is customary with that society, in such grants, to insert a clause that the tenant shall not sell or assign without the license of the society, and for the grantees when they wish to transfer their interest to surrender the chambers (upon a proper deed stamp) to the treasurer and ancients, to the intent that they shall grant the said chambers to the transferee, which subsequent grant is never in point of fact made, but simply an entry of admittance is inserted in the society's books. *Doe v. Miller*, 1 T. R. 393. "It is therefore evident," says Mr. Adams in his treatise on Ejectment, p. 61, "that after the first surrender the legal estate always remains in the treasurer and ancients as trustees for the subsequent transferees respectively; and that the terms 'surrender' and 'admittance' bear not the slightest resemblance in their meaning to the surrender and admittance to copyhold premises."

cupant must be decided by the grant.

Per Cur. We are of opinion that the defendant is entitled to our judgment. By the copy of court-roll of 1752 an estate was granted to P. C. for the lives of herself and T. E., and during the life of every and either of them the longest living, successively, according to the custom of the manor. That estate might, by custom, have enured to the person nominated as the second life, or to the heir or devisee of P. C., but no such custom is stated in this case. We must therefore have recourse to the general rules of law. Now, by the grant of 1770, an estate was given to B. C. in reversion, to take effect after the death, surrender, forfeiture, or other sooner determination of the estate of P. C. By the general rule of law there cannot be a general occupant of copyhold lands, nor any special occupant, unless expressly named in the grant.

V. Relative to the Transmission of Copyhold Estates.

(A) *As to the Surrender.*

(*a*) *As to its Necessity.*[1]

(*b*) *What shall amount to a Surrender.*[2]

(*c*) „ *may be Surrendered.*[3]

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[1] A copyhold estate cannot properly be transferred through any other medium than that of a surrender, except by legislative powers. Before the statute of *Quia emptores terrarum* this was a usual mode of conveying freehold estates (1 Mad. Bar. Angl. c. 3, 4, p. 230, b.; Mad. Form. Angl. No. 6; Dalrymp. F. P. c. 6, s. 1; and copyholds being still considered in law as estates at will they can only be thus transferred. A surrender may be defined as the yielding up of an estate by the tenant to the lord, either as a relinquishment or resignation of such estate, or as the means of conveying it or transferring or devising it to another. 1 Scri. Cop. 151–157.

By the custom of the manor of T., containing copyholds of inheritance, when a copyholder in fee devises lands to such uses as J. S. shall appoint, and dies, and his death is presented, the lord, after three proclamations, may seise until admission of the customary heir, or some other person seeking admittance; and the heir, or such other person, may be admitted to hold for the intents and purposes declared by the will, and under and subject to the powers contained in the will; and the heir, or other person so admitted, pays the same fine as upon admission to a fee simple; and when, after such admission, J. S. appoints, and the instrument of appointment is enrolled, the appointee is admitted, whether or not there has been any other admittance before appointment. The court held that, although the person admitted before execution of the power be himself the heir, and the power be afterwards executed in his favour, he must, after the creation of the power, be admitted again, and pay a fine, before he can surrender the estate, because immediately on the execution of the power the effect of the first admittance expires and there is a vacancy on the roll. *Reg. v. Corbett*, 1 E. & B. 836.

Where, according to the custom of a manor, the customary tenements pass by lease and release and admittance, although no surrender be required, the freehold is in the lord, and not in the tenant. *Thompson v. Hardinge*, 1 C. B. 940; 14 L. J. C. P. 268.

As to how far entries upon the roll are evidence of custom as to inheritance by descent within the manor, see *Muggleton v. Barnet*, 2 H. & N. 653; 27 L. J. Ex. 125.

[2] The word "surrender," is said by Sir Edward Coke to be *vocabulum artis*, and to admit of no qualified term (Co. Cop. s. 39, Tr. 86; and *see* 6 Vin. Abr. Cop.); yet he tells us in the same section that a surrender (when by a subsequent admission the grant is to receive its perfection and confirmation) is rather a manifesting of the grantor's intention than the passing away any interest in the possession. But although there is such seeming obscurity and inconsistency in the books, the distinction is that the rule does not extend to conveyances between the lord and his tenants. *See* 2 Watkins, 76; 1 Lev. 137; 6 Vin. Abr. Cop.; Com. Dig. Cop.; Bac. Abr. Copyhold, and Fisher on Copyholds. It has been holden, that if the copyholder use the words "bargain and sell," instead of "surrender," it will be sufficient to extinguish his copyhold for the benefit of the lord (Hutton, 65; Sir W. Jones, 41); and a parol agreement has been adjudged a surrender (2 Show. 131); but that such words would not operate as a surrender so as to benefit a stranger, for in that case the heir of the copyholder may avoid it. Carth. 57.

[3] Nothing can properly be the subject of a surrender but a legal interest. When a person, therefore, is not in the seisin, he cannot properly surrender. If he has only an equity, or right, or authority, or, in short, any claim which lies not in tenure, he must pass it by another mode of conveyance. *See* 3 T. R. 365; 6 id. 63; 1 Anst. 11. An equitable interest in copyholds, therefore, may be assigned or devised without a sur-

(*d*) *As to who may Surrender.*[1]

(*e*) „ *the Place and Mode of Making a Surrender.*[2]

render. 1 Atk. 388; 2 id. 38; 3 id. 73; 1 Ves. 121; 1 B. & C. 461. So, if an authority or power be given to a person, he may exercise it, and the vendee or appointee shall be in by the original instrument, without a new surrender to his use. 2 Wils. 400; Cro. Jac. 199; 1 Scri. Cop. 168, 196.

[1] To enable a person to surrender, it is not necessary he should be in possession. *Kren v. Kirby*, 2 Mod. 32; S. C. 1 Mod. 200; S. C. 1 Freem. 192; 2 Danv. 231. A surrenderee of copyholds cannot surrender before admittance, even though the surrender to him is presented; nor will his admittance subsequent to his surrender make such surrender valid by relation. Co. Copy. s. 39; Tr. 87; Supp. s. 4; Sty. 146; 2 Bl. Com. 368; Poph. 127; S. C. 3 Bulst. 237, 240; Yelv. 144; S. C. 1 Brownl. 143; Co. Litt. 60, a, n. 2; 11 East, 246; Bridgm. 13; Rep. 81; Cro. Jac. 368; S. C. 2 Bulst. 336; 3 Cro. 29, a; 2 Wils. 13; 6 Vin. Cop. E. b. So, devisees of contingent remainders in a copyhold are incompetent to make a surrender of their interest. *Doe d. Blackerby v. Tomkins*, 11 East, 185. So, if a person be wrongly admitted, he who has the right may release it, but he cannot make a surrender. *Stone v. Exton*, 2 Show. 83. But, any person having such an estate as may be the subject of a surrender, must be presumed capable of making it; and, therefore, if they are not, it must be from a personal incapacity; as, by being under age: but an infant heir may be ordered to surrender. 7 T. R. 103.

Where a *feme covert* can only surrender with the consent of her husband, his consent will not be presumed, it must be expressed in the surrender. *Doe d. Shelton v. Shelton*, 3 Ad. & E. 265; 4 Nev. & M. 857.

[2] A surrender may be made either in or out of court. Little need be observed on a surrender in open court.

The lord is, in all cases, capable of taking a surrender when he is merely the medium of transfer. *Pitt v. Moore*, 2 Show. 154; 2 Mod. 287; 2 Jones, 153; 1 Vent. 359; 1 Freem. 245. A steward, as incident to his office, may take a surrender out of court. *Dudfield v. Andrews*, 1 Salk. 184; *semb. contr. Owen v. Saunders*, 1 Ld. Raym. 158. A clerk may take surrenders if there has been a usage to that effect. *Doe v. Mellish*, 1 M. & P. 30; 5 Ad. & E. 541. As the steward, in all cases, acts only ministerially, if he be an infant, or *non compos mentis*, an idiot, a lunatic, an outlaw, or excommunicate, it matters not, as he is but custom's instrument. And if he acts ostensibly as steward it is sufficient, though his authority afterwards prove counterfeit (*see* Co. Copy. s. 41; Tr. 104); it is a matter of a common right as incident to the copyholder's tenure. No special custom need be alleged for his doing so. (Co. Litt. 59, a.) Such surrender requires no presentment to effectuate it, but is immediately enrolled. *See* 1 Watkins, p. 73. "When a surrender is made out of court into the hands of any who cannot thereupon make an admittance, or if no admittance be immediately made by a person enabled to admit, such surrender should be regularly presented." (*See* 1 Watkins on Copyholds, p. 79.) "When the lord, therefore, takes a surrender out of court, he may admit without any presentment." (Id. 80.) "If the surrender be made into the hands of the tenants, or into those of the reeve or bailiff, or, in short, of any other person than the lord or steward, the surrender must be presented in court, in order to inform the lord or the steward that such presentment was taken" (Co. Litt. 52, a.); and should, when essential, be made in due time, according to the custom of the manor (*Smith v. Paynton*, Carter, 73); as otherwise the surrender will become absolutely void; and must also accord with the surrender. (*See* Watkins, vol. i. p. 87; Scriven, 287; Co. Cop. s. 40; 2 Bl. Com. 369; Gilb. Ten. 369.) As to drawing up the surrender, it is proper to mention that a custom, that the steward or deputy have the sole privilege of preparing surrenders, is good. *Rex v. Rigge*, 2 B. & A. 550.

Where by the custom of a manor it is incumbent on a surrenderee to come within three years after the surrender has been presented, and take up the same, and pay his fine; the omission to come does not avoid the estate. Where, therefore, M. made a conditional surrender of copyhold premises within such a manor to G. in August 1855, upon trust to secure an annuity payable to J., and such surrender was presented at the next general court-baron held in April 1816, but G. was not admitted tenant until April 1820; ejectment was afterwards brought by G. in default of payment of the annuity; the court held that the custom could only be considered between the lord and tenant, and did not, as between third parties, operate to avoid the admittance or prejudice the lessor of the plaintiff in the action. *Doe d. Warwick v. Coombes*, 14 L. J. Q. B. 37; 8 Jur. 1166.

By the written customs of the manor of Hackney (confirmed by a private act of parliament), every person to whose use lands are surrendered ought to come within three years after the surrender is presented and be admitted. The court held that this custom was only for the benefit of the lord, who might waive it, and grant a valid admittance after the expiration of the three years. *Doe d. Warwick, v. Coombes*, 6 Q. B. 535.

It seems that the steward is bound to accept a surrender to a third person, although it contains a reservation to the surrenderor of all mines and minerals, and the right to enter and get them; and even although it expressly grants them in a manor where the copyholders cannot work the minerals without the consent of the lord. *Marquis of An-*

glesea v. Lord Hatherton, 10 Mee. & W. 218; 12 L. J. Ex. 57.

A surrender to such uses as the surrenderor shall by any writing under his hand appoint, and in default of appointment to the use of E., is not such a surrender as, in the absence of a special custom of the manor to that effect, the lord is compelled to receive and enrol. *Flack v. Downing College*, 22 L. J. C. P. 229; 17 Jur. 697.

[1] On a surrender being made no estate passes in conveyance to the lord, but it remains till the nominee be admitted in the surrenderor. *Roe d. Cosh v. Loveless*, 2 B. & A. 453. *Doe d. Shrewen v. Wroot*, 5 East, 132; 1 Smith, Rep. 363. *Doe d. Tofield v. Tofield*, 11 East, 246. *Roe d. Noden v. Griffiths*, 4 Burr. 1953; 1 Black. 605. *Vaughan d. Atkins v. Atkins*, 5 Burr. 2765. *Holdfast v. Clapham*, 1 T. R. 600. *Benson v. Scot*, 1 Salk. 185; 3 Lev. 385; Skin. 406; Comb. 233; 4 Mod. 251; 12 id. 49); and he has a right to retain the possession, subject to his accounting for the mesne profits, if the surrenderee is afterwards admitted. *Roe d. Jefferey v. Hicks*, 2 Wils. 13. *Doe d. Bennington v. Hall*, 16 East, 208. The surrenderee cannot, therefore, maintain an action of trespass (Cro. Eliz. 439); nor can he surrender to another (1 Brownl. 143; Yelv. 144; 10 East, 251; Gilb. Ten. 275, 281, &c.; Cro. Eliz. 504); so, as he has nothing to transfer, he can have nothing to forfeit. If he commit felony and be attainted, or if he commit waste, no forfeiture will ensue. *See* 2 Wils. 13; Co. Cop. s. 15 to p. 137; Moore, 49; Gilb. Ten. 235, d. The surrenderee is now, however, regarded as having such an interest in the premises as may be the object of a devise or assignment (*see* 2 Ch. Rep. 4; Wils. Ch. Rep. 76; 2 Freem. 157; 1 T. R. 531, 601, 602; 2 Vin. 679; 1 Mod. 636; 2 Wils. 400; 1 P. Wms. 309); but an heir cannot devise before his admittance, for he has more than an equity. *See* 1 Stra. 487; *sed vide* 55 Geo. 3, c. 192. So, if a surrender be made, it would seem the surrenderor may assign his interest, and the lord shall be compelled to admit. *See* 2 T. R. 314; Gilb. Ten. 285; 4 Burr. 1952; 1 Black. 605; 10 East, 208.

A. being the owner of a copyhold, made a conditional surrender of it in the year 1826 to W., to secure money lent. In 1832 A. sold the copyhold to G., and made a surrender of it to him absolutely. In 1833 G. was admitted tenant; and in 1834 W. was also admitted tenant:—*Held*, that, on ejectment brought by W., he was entitled to recover. *Doe v. Gibbons*, 7 C. & P. 161.

The surrender and presentment ought to be duly enrolled by the steward on the court rolls, but an entry in the steward's handwriting, found amongst the lord's muniments, is evidence. *Doe d. Priestley v. Calloway*, 6 B. & C. 484; 9 D. & R. 518. In the case in which it was so decided, the court said, —"It appeared that in this case the surrender had been made out of court, and had been presented, as it was stated, on the foot of the surrender, by the foreman of the homage jury. By the draft, as it was called, it would appear that that surrender had been made at the court in 1792. The surrender thus underwritten, and the rough draft indorsed, as it appeared by the case, had been found among the muniments of the manor. The question then was, whether, independent of the entry of 1820, there was legal and sufficient evidence of the presentment of the surrender in 1792. Littleton had been cited to show that the copy of the court-roll was the only evidence upon which a copyhold tenant could rely to support his title; but the passage cited only went to show 'that proof by copy was the best mode of proving the title by pais, in contradistinction to proof by matter of record.' Now, suppose all the rolls of a court were destroyed by fire, or lost through the carelessness of a steward, could it be said that therefore the copyhold tenants must be without any evidence to sustain their title? Undoubtedly it could not. The production of the roll or copy was not the only evidence of the title. The roll was not a matter of record; it was not conclusive as to its contents. In *Foster's case* (1 Leon. 289), a mistake in the date of a surrender was allowed to be corrected. So, in the case of a surrender upon condition, if in the enrolment the condition by mistake be omitted, it may be corrected by evidence of the truth of the matter (Dyer, 215, b; *Winter v. Jeningham*, Gilb. Ten. 192, 254); and in the case of *Bunting v. Lepingwell* (4 Co. Rep. 29 b), *Lord Coke* puts the case of a surrender made through the hands of a tenant who dies; and he says, 'yet if it is upon good proof presented, it is well enough.' In another case (*Anonymous*, Lord Raym. 735), it was stated by *Lord Holt* that the rough draft of the steward was good evidence. In fact, the rough draft was the original, though the fairer transcribed copy was more convenient. For those reasons (independent of the customs founded in this case, and upon which we give no decided opinion), we are of opinion that the evidence adduced to prove the presentment in 1792 was admissible, and that in point of effect it was sufficient."

[2] Surrenders of copyholds are in general governed by the same rules as common-law assurances (*Idle v. Cook*, 11 Mod. 57; 2 Salk. 620; 2 Ld. Raym. 1144; 1 P. Wms. 70); guided by special custom (*Fisher v. Nicholls*, 3 Salk. 100). Where, therefore, an estate for life was limited to the father or mother only, and the subsequent limitation was to the heirs of both their bodies, the latter was viewed as a contingent remainder to the heirs (*Frogmorton d. Robinson v. Wharrey*, 2 Bl. Rep. 728; 3 Wils. 125); and, indeed, the same words are requisite to

(*h*) *As to the Revocation of a Surrender.*[1]
(*i*) „ *an Erroneous Surrender.*[2]
(*k*) „ *the Mode of Enforcing a Surrender.*[3]
(B) *As to the Admission.*
(*a*) *As to its Nature, and when an Admission is necessary.*[4]
(*b*) „ *the Proclamations previous to Admission.*[5]

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create certain estates of copyholds as are necessary to the creations of freeholds. *Wright v. Kemp*, 3 T. R. 470. It seems, also, that words in a surrender of copyholds will receive the same construction as similar words in a conveyance to uses. *Fisher v. Wiggs*, 12 Mod. 296; S. C. 1 Ld. Raym. 622; Com. 88, 92; 1 P. Wms. 14; Holt, 369; S. C. 1 Wils. 342; S. C. 1 Salk. 391; 3 id. 206. It is also a general rule of construction, that where there is a sufficient certainty before, a subsequent mistake shall not injure the surrender (*Goodright d. Lamb v. Pears*, 11 East, 58); and, indeed, the intention of the parties will prevail in all cases. *Roe d. Hucknall v. Foster*, 9 East, 405.

There is nothing inconsistent in concurrent customs of having copyhold estates by surrender and recovery. *Doe d. Whalhead v. Ossingbrooke*, 9 Moore, 633; 2 Bing. 70.

And a custom to surrender land in trust is good. *Snook v. Southwood*, 5 Ad. & E. 239.

[1] A surrender to uses, reserving power to revoke them, can be maintained, and is applicable to copyholds. *Boddington v. Abernethy*, 5 B. & C. 776; 4 D. & R. 626.

A surrender is not revocable when supported by an obligatory consideration; but a voluntary surrender may be revoked. Ritch. 121; Lane, 99; Cowp. 705; Cro. Car. 273, 283; 6 Vin. Cop.; H. T. a; 1 Roll. Abr. 499, 500, e; 2 Danv. 180, pl. 2; 1 Watk. on Cop. 87; Cowp. 703.

[2] If the presentment be truly made, and accord with the surrender, and yet be wrongly entered on the rolls, the rolls shall be amended.

[3] After petition to the Court of Chancery for a surrender, the Queen's Bench will not interfere. *Reg. v. Pilt*, 2 Per. & D. 385; 10 Ad. & E. 272.

[4] In admitting a tenant, the lord is merely an instrument, whether the admittance be on a voluntary grant, or surrender, or descent. If a copyhold escheat to the lord, he may devise it by copy again; but such demise is entirely dependent upon his own inclination. But though the grant of such land by copy is dependent upon his will, the admittance upon such grant is wholly regulated by the custom.

By the grant the lord has signified his choice; and his office ceases when the custom immediately attaches, and imperiously prescribes the form. He becomes a mere instrument; he cannot vary the tenure or estate, the rents or services. Co. Cop. s. 41; Tr. 80; 2 Bl. Com. 370, c. 22. In admittance on a descent or surrender, the lord is also a mere instrument. In the latter case, he has only a power or authority to admit according to the surrender; he cannot vary the estate limited by the surrender, or grant it to a person whom the surrenderor has not designated. If he admit otherwise, however much his act may bind himself, it will be by no means obligatory on others. 4 Co. 28, b; Co. Copy. s. 41; 3 Burr. 1543; 4 id. 1961. An admittance is only necessary to perfect a legal title, where the surrender of the previous estate is necessary. *Roe d. Coss v. Loveless*, 2 B. & A. 453. Where, therefore, the husband of a woman tenant of a copyhold is entitled by the custom to hold on at her death in the nature of a tenant by the courtesy, her admission is not a necessary ingredient in a case where her title is, by the general law, complete without admission. *Doe d. Milner v. Brightwen*, 10 East, 583. But the executor or administrator of a termor is compellable to be admitted. *Earl of Bath v. Abney*, 1 Burr. 206.

An admission may be by statute, by what is equivalent to a surrender. *Doe d. Thompson*, 1 Nev. & P. 215; 5 Ad. & E. 532.

But an enrolment descending to the heir is not admittance within the Stamp Act. *Doe d. Lord Carlisle v. Towns*, 2 B. & Adol. 505.

A devise by a surrenderee who has not been admitted confers no legal right on the devisee, notwithstanding the surrender may have been for a valuable consideration, and even although the devisee be admitted. *Matthew v. Osborne*, 22 L. J. C. P. 241; 17 Jur. 976.

Where copyhold lands, descendible from ancestor to heir, according to the custom, are held for the joint lives of the lord and the tenant for the time being, and the copyholder is admitted to hold to him (not saying "and his heirs") for the joint lives of himself and the lord, according to the custom: — *Held*, that the heir of the copyholder could not maintain ejectment before admittance. *Doe d. Dand v. Thompson*, 13 Q. B. 670; 18 L. J. Q. B. 326.

[5] When a tenant dies, his death should be presented, and proclamation made for the party claiming title to the land to come in and be admitted. The presentment and proclamation may be in general terms. *Doe d. Whitbread v. Jenny*, 5 East, 522; 2 Smith's Rep. 116. *Earl of Salisbury's case*, 1 Lev. 63; 1 Keb. 287. If no person attends on the first proclamation made, the proclamation ought to conclude with a direction for a second proclamation to be made at the next court. At the next court the second proclamation is to be made accordingly, and in case of non-attendance it should direct a third proclamation to be made at the succeeding court, when, should the heir or other

(*c*) *As to the Parties who may Admit.*[1]
(*d*) „ *Parties entitled to be Admitted.*[2]
(*e*) „ *Place where it is to be made.*[3]
(*f*) „ *Mode in which it is to be made.*[4]
(*g*) „ *Effect of Admission.*[5]

person entitled not claim to be admitted after the third proclamation is made, a process may be issued by the lord or steward to the bailiff of the manor to seize the lands into the lord's hands for want of a tenant, as in the case from 1 Levinz, 63. These proceedings are duly entered on the rolls of the manor-court, and should the admission ultimately take place, it is also in due form recorded. *See* Forms, in 1 Watkins by Coventry, p. 293, &c.; 2 Scri.

[1] In the case of descents and surrenders, the lord, the steward, or under-steward, are merely instruments. They are compellable to admit, if ostensibly such, and the tenant is not to inquire into the legality of their title.

[2] A *mandamus* may be granted to admit the person who appears to have the legal estate, without regard to his equity. *Rex v. Coggan*, 6 East, 431; 2 Smith's Rep. 417. Tapping on *Mandamus*, 154 to 160. But, though the lord shall not be permitted to defeat the right of the surrenderor with respect to the nomination of a legal successor in the tenancy, yet, on the other hand, the tenant must not be permitted to prejudice the rights of his lord. *See* Bro. Fealty, pl. 15; Co. Litt. 66, b; 2 Ld. Raym. 864; Co. Cop. s. 4, tr. 113, 114; 1 Watkins on Cop. by Cov. p. 299, n; and 1 Scriven. 340. And if one of a number of parties entitled to a copyhold estate offer to be admitted, the lord cannot refuse to admit him, no prejudice arising therefrom, as he has his remedy for the recovery of what amount of fines may have been recovered by the others. 2 Wils. 162.

The grantee of a copyhold in reversion need not be admitted. *Doe d. Leach v. Whitaker*, 3 Nev. & M. 225; 5 B. & Adol. 409.

And the admission to copyhold of a trustee or appointee is sufficient. *Rex v. Lord of the Manor of Oundle*, 3 Nev. & M. 484, 496; 1 Ad. & E. 284. So, the assignees of a bankrupt copyholder may be admitted. *Doe d. Danson v. Parke*, 4 Ad. & E. 816. But copyholds passed to the assignee of an insolvent debtor without entry on the roll. *Doe d. Smith v. Glenfield*, 1 Scott, 669; 1 Bing. N. S. 725.

[3] The lord or his steward may admit, as well out of court as in, since the approbation, or even the testimony of the former tenants, is not requisite. The admission must be, however, notified at the next court day, for the information of the tenants (Watk. n. cxi. to Gilb. Ten. 448, 449). It is said, indeed (Bro. Court Bar. pl. 22; 22 Co. Cop. s. 46, p. 107; Kitch. 82, b), that an under-steward cannot admit out of court. (*Sed quære? see* 1 Ld. Raym. 659; 1 Salk. 184). It was, however, settled, that, although a lord may, a steward cannot admit out of the manor without a special custom. *See* Cro. Car. 367; 4 Co. 26, b; 27, a; Co. Litt. 58, a; 1 Ld. Raym. 76.

Where the admittance has been by the steward off the manor and invalid, it will be presumed, after the lapse of a long period of enjoyment under the admittance, that it has been ratified by the lord. *Doe d. Gutteridge v. Sowerby*, 8 W. R. 293; 36 L. T. 150.

[4] An admittance may be either express or implied. 1 Roll. Abr. 505, Copy. pl. 2; 3 Bulst. 217; id. 239; Dyer, 292, a, pl. 68; id. 222, a. pl. 68. But it would be imprudent in these cases to forego an actual admittance (*Brown v. Dyer*, 11 Mod. 73), as the surrenderee has no transmissible or legal interest till admission. *Rawlinson v. Green*, 3 Bulst. 237. *Doe d. Tofield v. Tofield*, 11 East, 246. But as the lord is not obliged to admit the tenant in his own person, it is not essential that the tenant be personally admitted (*Blunt v. Clark*, 2 Sid. 61), unless a custom exists to the contrary. *Wymer v. Page*, 1 Stark. N. P. C. 9.

The admission of a tenant should be notified to the other tenants. *Doe d. Leach v. Whittaker*, 5 B. & Adol. 409; 3 Nev. & M. 225.

[5] A surrenderee is not tenant for any purpose before admissions. *Phillibburn v. Ryland*, 8 Mod. Rep. 352; 2 Ld. Raym. 88; 1 Stra. 624. *Blackburn v. Graves*, 1 Mod. 102; 1 Vent. 260; 3 Keb. 263, 329; 2 Lev. 107. Unless the copyholder take by the act of the lord. *Keen v. Kirby*, 1 Mod. 200; Carter, 237; 1 Freem. 192; 2 Mod. 32. On the death of his ancestor, the heir may enter and take the profits (4 Co. 22, b; 23, b); and maintain an action for any trespass done to his possession. 4 Co. 23, b. He may also make a lease of the copyhold, as warranted by custom, and on such lease an ejectment may be brought (1 Leon. 100; Moore, 596; Cro. Jac. 403); but, before his admission, the heir is not entitled to be sworn on the homage, nor can he maintain a plaint in the nature of an assize. Co. Cop. s. 41, Tr. 94; Kitch. s. 19; Gilb. Ten. 287. If the heir die before admittance, his heir may enter (4 Co. 23 b); and such death will not prevent the widow from being endowed, nor the husband from being tenant by the courtesy (Co. Cop. s. 41); and if the heir die after having entered, there shall be a *possessio fratris* even before admittance. Watk. on Desc. 96. The heir may even surrender to the use of another, on satisfying the lord for his fine. 4 Co. 22, b; Ketch. 162; Cro. Jac. 36; Cro. Eliz. 662; Yelv. 145; 3 Lev. 327; 1 Com. 241; 1 Anst. 11.

(*h*) *As to an Erroneous Admission.*[1]

VI. Relative to the Destruction of Copyhold Interests.

(A) *By Forfeiture.*[2]

Where a copyhold is devised by A. to B. for life, remainder to C. in fee; B. is admitted and dies; C. has before entry a descendible estate, and upon the death of C. his customary heir, and not the customary heir of A., is entitled to the copyhold. *Doe d. Parker v. Thomas*, 3 Man. & G. 815.

The court-rolls containing a presentment of an admittance upon a surrender out of court are primary evidence of the surrender, as between the surrenderor and surrenderee, without producing the original surrender or inquiring into the sufficiency of the stamp upon it. *Doe d. Garrord v. Otley*, 12 Ad. & E. 481; 4 Per. & D. 275. See *Standen v. Christmas*, 10 Q. B. 135; 16 L. J. Q. B. 265. *Doe d. Evans v. Walker*, 15 Q. B. 28; 19 L. J. Q. B. 293.

[1] An erroneous admission is wholly void, and the lord or steward must afterwards admit according to the surrender. *Grantham v. Copley*, 2 Saund. 422; 1 Scri. 72.

[2] When the customary heir or surrenderee neglects to come in and be admitted, the lord may, by special custom, make an absolute seizure. *Doe d. Tarrant v. Hellier*, 3 T. R. 162. *Lord Salisbury's case*, 1 Keb. 287. So, if a copyholder be attainted of treason or felony, his estate becomes forfeited to the lord. *Benson v. Strode*, 2 Show. 150; S. C. Skin. 8; Pollexf. 615; 2 Jones, 189. *Sed vide Jory v. Pawley*, 1 Lev. 263; S. C. 2 Keb. 457, 466. Outlawry is also a cause of forfeiture of copyholds. *Rex v. Budd*, Park, 190. So, if the copyholder convey any common-law interest in his lands to another, it is a forfeiture. Thus, if he make a feoffment with livery (*Eastcourt v. Weeks*, C. P., 1 Salk. 186), or levy a fine (*Doe d. Tarrant v. Hellier*, 3 T. R. 162), or make leases of the copyhold land not warranted by custom, unless by license of the lord. *Richards v. Sely*, C. P., 2 Mod. Rep. 79; S. C. 3 Keb. 638.

All persons of sufficient understanding may forfeit a copyhold, but a person of non-sane memory, an idiot, or a lunatic, is unable to forfeit. So, an infant under the age of fourteen, because he wants discretion; but an infant at the age of discretion may forfeit his copyhold, not by offences proceeding from negligence or ignorance, but by such as proceed from contempt. So, a married woman cannot by any act of her own forfeit her copyhold, because she is not *sui generis sed sub potestate viri*, unless it be for treason or felony. Co. Cop. s. 59, Tr. 136; 1 Hawk. P. C., c. 1, s. 11. If a copyholder for life commit a forfeiture, the lord, and not the remainderman, must take advantage of it (*Keen v. Kirby*, C. P. 1 Mod. 200. 1 Scriven on Copyhold, 59. S. P. *Wade v. Bache*, 1 Saund. 151; S. C. 1 Sid. 360; S. C. 2 Keb. 341. S. P. *Smartle v. Penhallow*, 2 Ld. Raym. 1000; S. C. 1 Salk. 189; S. C. 6 Mod. 67); unless a contrary rule is given effect to by the terms of the lord's grant. *Strode v. Dennison*, 3 Lev. 94; 2 Show. 150; S. C. T. Jon. 189; S. C. Skin. 8, 29; S. C. Pollexf. 619. Any person who is lord by right may dispense with a forfeiture, but a lord by wrong cannot purge a forfeiture as to a rightful lord. *Milfax v. Baker*, 1 Lev. 26; S. C. 1 Keb. 25.

A copyholder, though a tenant at will, is, unlike such tenant, liable for permissive as well as voluntary waste. If a copyholder, therefore, suffer a house to become ruinous, the estate becomes again the lord's property. *Eastcourt v. Weeks*, 1 Salk. 186; S. C. Lutw. 317.

Waste, unless injurious to the inheritance, is no forfeiture. *Doe d. Grubb v. Burlington, Earl of*, 2 Nev. & M. 534; 5 B. & Adol. 507.

Where a copyhold is forfeited by attainder, the lord should take a step to divest such party of the estate. *Doe d. Evans v. Evans*, 5 B. & C. 584; 8 D. & R. 399. And a party to whom a copyhold is surrendered before the tenant is convicted of felony must be previously admitted; if not, the copyhold is forfeited. *Rex v. Mildmay*, 2 Nev. & M. 778; 5 B. & Adol. 254. But the omission of a lord of the manor to seize for forfeiture does not deprive the succeeding lord of his right. *Doe d. Bover v. Trueman*, 1 B. & Adol. 736.

A canal company was authorised by statute to purchase land on voluntary or compulsory sale by the persons interested (at prices to be agreed upon or ascertained by commissioners or a jury), and a form of conveyance was prescribed purporting that the party granted all his "right, title, and interest to and in the same and every part thereof, to hold to the company for ever." The company was authorised to enter upon payment of the price or tender, and was made liable to render compensation for damage done by their works, if claimed within six months. A copyholder in fee executed a conveyance in the statutory form to the company, who paid him the price and entered. It was held that the conveyance passed only such interest as the copyholder could convey without the lord, and that on the copyholder's death, no other person having been admitted, the lord might seize *quo usque* for want of a tenant, and maintain ejectment and an action for mesne profits against the company. *Dimes v. Grand Junction Canal Co.* 9 Q. B. 469; 16 L. J. Q. B. 107; 3 H. of L. C. 791; 17 Jur. 73.

The 11 Geo. 4, and 1 Wm. 4, c. 65, s. 9, enacting that no infant shall forfeit copyhold land for his neglect or refusal to be admitted, does not prevent the lord from seizing *quo*

(B) *By Extinguishment.*[1]

(C) *By Enfranchisement.*[2]

VII. As to the Relative Situation of Lord and Tenant.

(A) *As to the Lord.*

usque. Dimes v. The Grand Junction Railway Company, supra. Doe d. Twining v. Muscott, 12 Mee. & W. 832; 14 L. J. Ex. 185. As to equity relieving against forfeiture, *see* 4 Kay. L. J. 372; 27 L. J. Ch. 655.

The lord has no right to hold against the heir merely on an alleged devise to persons who have not claimed admittance. *Doe d. Le Keux*, 6 Q. B. 631; 14 L. J. Q. B. 77.

The rector and lord of the manor of B., by one grant demised for three lives at one aggregate holding, and at one undivided rent, three ancient tenements, originally held of the manor under distinct grants and at one undivided rent, three ancient tenements, originally held of the manor under distinct grants, and at distinct rents. The same rector afterwards disposed of the reversion in fee under the Land Tax Redemption Act, 42 Geo. 3, c. 116:—*Held*, that although the grant for lives might be void, unless sanctioned by special custom in the manor, yet the purchaser of the reversion had good title, the sale being approved of by the land-tax commissioners. *Doe d. Strickland v. Woodward*, 1 Ex. 273.

[1] To create an extinguishment of copyhold property by its being merged in a freehold, the freehold and copyhold interest must be of the same premises; and the interests must be united in the same person — for while they continue separate no extinguishment can take place (2 Co. 16, b; 4 id. 24, b; Cro. Jac. 573; Hob. 181; 2 Roll. Rep. 178) — and in the same right. Co. Cop. s. 62.

[2] The next mode of extinguishing a copyhold is by enfranchisement, by which the tenure is changed, independently of statutory powers, from base to free; and this will be presumed, even against the Crown, to support a very long possession. *Roe d. Johnson v. Ireland*, 11 East, 280. An enfranchisement is effected by the lord conveying to the tenant the freehold of the premises held by copy. It may also take place from the lord's releasing to the copyholder his seignorial rights and services; so, if the lord ratify and confirm the customary estate to the tenant, and grant that it shall be free from all customary services due in respect of such tenancy. *Doe d. Reay v. Huntingdon*, 4 East, 271. To enable the lord to enfranchise absolutely, he must have it in his power to convey the fee-simple of the freehold interest. A lord having only a partial interest in the manor cannot enfranchise in fee (1 Watk. 363); unless, indeed, such particular tenant of the manor have a power to enfranchise in fee reserved to him, on the creation of his estate, by a person having the fee-simple of the manor (1 Jac. & Walk. 611; and *see* 2 Roll. Abr. 271; Cro. Eliz. 459): but it is not essential that the conveyance of the freehold to the tenant be immediately from the lord; for if the lord convey the freehold to a stranger, and the stranger convey it to the copyholder, the base tenure will be destroyed. 1 Watk. 362. Immediately on the lands becoming enfranchised, they become severed from the manor, and the lord divested of his power. The tenure, therefore, being extinct as to the enfranchising lord, he cannot consequently reserve to himself any services on such enfranchisement. *Bradshaw v. Lawson*, 4 T. R. 443. Enfranchisement is now effected under statutes passed with a view to promote the enfranchisement of copyhold lands. *See* 4 & 5 Vic. c. 35; 6 Vic. c. 23; 7 & 8 Vic. c. 55; 14 & 15 Vic. c. 104; 16 & 17 Vic. c. 57; id. 124; 21 & 22 Vic. c. 53 and 94; 24 & 25 Vic. c. 75. Tapping on Copyhold Enfranchisement. Before the statutes, such mode was adopted as to convey the freehold of the premises by feoffment, bargain and sale, or the like. 1 Watk. 365. *See* 4 Jur. 428; 27 L. J. Ch. 945.

By 4 & 5 Vic. c. 35, a variety of alterations have been introduced with respect to copyhold estates: it has, however, been deemed advisable to insert the cases on the subject in the text and notes, as a guidance under the statute, as well as with reference to litigation which may arise connected with copyholds previous to the passing of the act, especially as the 4 & 5 Vic. is not compulsory; it being entirely voluntary whether the copyholder will avail himself of the statute or not. The statute is intituled, "An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights; and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure;" and came into operation on the 21st June, 1841, with the exception of ss. 86, 87, 88, 89, and 90, which were not to be in force until the 31st December, 1841.

The preamble, after reciting, "that it is expedient to provide the means for an adequate compensation for the rents, fines, and heriots, payable to the lords of manors, in respect of lands of copyhold and customary tenure, and in respect of other lands subject to such payments, or any of them, and for facilitating the voluntary enfranchisements of such lands, and for improving such tenure," enacts, that "The Tithe Commissioners for England and Wales, for the time being being, shall be the commissioners for carrying this act into execution; and that, should the same not be fully carried into effect before the duties of the said tithe commissioners shall cease, it shall be lawful in such case for one of her Majesty's

principal secretaries of state to appoint any number of fit persons to be commissioners to carry this act into execution, in the place of such commissioners so ceasing to act, and at pleasure to remove any one or more of the commissioners so appointed, so that the number of commissioners shall never exceed three; and upon every vacancy in the office of commissioner, some other fit person shall be appointed to the said office in like manner; and until such appointment it shall be lawful for the remaining commissioners or commissioner to act as if no such vacancy had occurred."

Commissioners.—By s. 2, the commissioners are to be styled "the Copyhold Commissioners," who are to cause a seal to be made, and all documents to which the seal is attached are to be received in evidence. By s. 3, the commissioners are to report to the secretary of state, and an annual report is to be laid before parliament. By s. 4, the commissioners may appoint and remove assistant-commissioners. By s. 5, no commissioner is eligible to sit in the House of Commons. By s. 6, the operation of the act as to appointments is limited to five years. By ss. 7, 8, and 9, the salaries, fund out of which payable, and the declarations of the commissioners, &c., are regulated. And by ss. 10, 11, and 12, commissioners may delegate their power, provide for disabilities of lords or tenants, and authorise agents being appointed by power of attorney.

Commutation, Notice of.—By s. 13 it is enacted, "that any lord or lords of any manor, whose interest shall not be less than one-fourth of the whole annual value of such manor, or any tenant or tenants of any manor to the number of ten, or where there shall not be so many tenants as ten, then one-half of the tenants of such manor may call a meeting of the lords and tenants of such manor, by a notice thereof in writing, under his or their hands, to be affixed at least twenty-one days before such meeting on the principal outer door of the church of the parish within the limits of which the said manor, or the greater part thereof in value, extends, or on the door, or on some conspicuous part of some house or building, wherein the courts for the said manor are usually held, and to be twice at least within such twenty-one days inserted in some newspaper (or once in each of two newspapers, published in successive days), generally circulated in the county within which the said manor, or the greater part thereof in value extends, for the purpose of making an agreement for the general commutation of the rents, fines, and heriots thereafter to become due in respect of lands holden of such manor, and of the lords' rights in timber; and every lord and tenant attending such meeting shall bear his own expenses of attendance; and the lord and tenants who shall be present at any such meeting called as aforesaid, such tenants not being less in number than three-fourths of the tenants of such manor, and the interest of the lord, and the interest of the tenants in the manor and lands respectively, not being less than three-fourths of the interest in the value thereof respectively, computing the interest of tenants as hereinafter is provided, may proceed to make and execute such an agreement as is hereinafter mentioned for the commutation of the rents, fines, and heriots thereafter to become due in respect of the lands holden of the said manor, and of the lords' rights in timber; and if expressly between such lords and tenants, the commutation may be made to extend to rights in mines and minerals, but otherwise shall not extend to or affect such rights; and thereupon such agreement shall be reduced into writing, and a memorandum or minute thereof shall be signed by the persons so agreeing to such commutation, or by their respective agents."

Agreement for.—By s. 14 it is enacted, "that such agreement for a commutation of the rights of the lord may be for the payment of an annual sum by way of rent-charge, and of a small fixed fine upon death or alienation, which shall in no case exceed the sum of five shillings, such rent-charge to commence, either in whole or in part, according as the said commissioners shall direct, from the date hereinafter mentioned (except where otherwise directed by the said commissioners), and to be valued and variable (when such rent-charge shall exceed twenty shillings), according to the price of corn, in like manner as is mentioned and provided with regard to the tithe commutation rent-charge, in and by the said act for the commutation of tithes in England and Wales; and the amount of every such rent-charge may be specifically stated in such agreement, or separate rent-charges may be therein agreed upon between the lord and any one or more tenants, parties to the agreement; or the agreement may provide that the entire rent-charge, though stated therein, shall be subject to increase or diminution by the valuers, to be appointed as hereinafter mentioned, to such an amount per centum as shall be therein expressed, or that such separate rent-charges as aforesaid shall be subject to increase or diminution to a given amount per centum, in certain events to be specified in the agreement; and the agreement may also determine the apportionment for each tenant, or it may provide that the entire rent-charge, or the apportionment thereof, shall be fixed by such valuers, subject to the approbation of the said commissioners; and it may be agreed, that so much of the rent-charge, to be apportioned as aforesaid, in respect of the lands of any tenant, as shall be in lieu of fines, or other manorial rights, to which such tenant would not be liable thereafter during his tenancy, shall not commence until the period of the next act or event on which a fine, or such other manorial right, would have become payable or due, and that the amount of such rent-charge shall be then increased accordingly; but such agreement shall not fix the time for the commencement of the rent-charge to be apportioned in respect of

the lands of any tenant who shall not be party to such agreement; and all other provisions may be made for carrying into execution the intention of the parties and of this act, so that nothing in such agreement contained (unless every tenant included therein shall be a party thereto) shall exclude or prevent the exercise of the powers hereinafter contained for apportioning the rent-charge according to the particular circumstances of each tenant, and for the relief of tenants for life, and other persons in the cases hereinafter provided for; and such agreement may fix a scale of fees to be payable to the steward, from and after the confirmation of the apportionment; but so, nevertheless, as not to affect the interests of any steward in office at the time of the passing of this act, who shall hold his office for life, or during good behaviour, or of any steward of a manor, so in office as aforesaid, where the usage shall have been such as, in the opinion of the said commissioners, to lead to a just expectation that the said steward will hold his office during his life or good behaviour; and such agreement may provide for the costs of the proceedings under this act, subject to the approbation of the said commissioners: Provided always, that in case of doubt or difference as to the sufficiency of interest of the parties to any such agreement, the decision of the said commissioners thereon shall be conclusive; and every agreement so made and executed, and confirmed in manner hereinafter mentioned, shall be binding on all persons interested in such manor or lands."

Consideration for.—By s. 15 it is enacted, "that such agreement for a commutation of the rights of the lord as aforesaid may also be for the payment of a fine on death or alienation, or at any fixed period or periods, to be agreed upon by the parties, every such fine to be fixed by the agreement, or to be subject to increase or diminution by the valuers to be appointed as hereinafter mentioned, to such amount per centum as shall be expressed in such agreement; but, in either case, to be valued in bushels of wheat, barley, and oats, in the same manner as the tithe commutation rent-charge, and to be subject, in like manner as such rent-charge, to variation according to the prices ascertained by the advertisement, provided for by the said act for the commutation of tithes in England and Wales, to be published next before the time of the happening of the act or event on which the fine shall become payable."

Provisional Agreements.—By s. 16, such agreements are to be binding, if executed by the necessary parties within six months.

Voting.—By s. 17, proportional interest, how to be computed, for the purpose of voting.

Meetings.—By s. 18, meetings may be adjourned after notice.

Form of Agreements and References to Arbitration.—By ss. 19, 20, and 21, the commissioners are to form agreements and circulate them: and, if disputes arise as to boundaries or commutation, to refer to arbitration.

Parties' Consent to the Agreement.—By s. 22 it is enacted, "that in every case in which any manor or lands shall be held under any archbishop, bishop, dean, dean and chapter, archdeacon, or any ecclesiastical or other corporation, or any body politic, and in every case in which any such person, ecclesiastical or other corporation, or body politic, or patron of any living, shall be interested in any manor or lands to the extent of one-third of the value thereof, computed as to such lands as aforesaid, or if it shall appear to the said commissioners that the interests of such person, ecclesiastical or other corporation, or body politic, would be affected by the commutation or enfranchisement under this act, no agreement to be made and executed under this act shall be deemed to be executed by the said lords and tenants, unless the consent of such person, ecclesiastical or other corporation, or body politic, shall be given under the hand or seal of the person, ecclesiastical or other corporation, or body politic, or patron of such living giving the same; and such consent shall be annexed to the agreement for commutation or enfranchisement, and taken as part thereof."

Agreement must be confirmed by the Commissioners.—By s. 23 it is enacted, "that every such agreement, as soon as may be after it shall have been executed by the lord and tenants to the number and value as aforesaid, shall be sent by the chairman of the meeting, or by the person in whose custody it shall then be, to the office of the said commissioners; and the said commissioners, by themselves, or by some assistant commissioner, shall cause inquiry to be made, and shall require such proof as will be satisfactory to them, whether or not it ought to be confirmed; and if they shall be satisfied it ought to be confirmed, the said commissioners shall confirm the agreement under their hands and seals, and shall add to such agreement the date of the confirmation, and shall publish the fact of such confirmation, and the date thereof, within the manor, in such way as they shall deem fit; and every such confirmed agreement shall be binding on all persons interested in the said manor, and on all persons interested in the said lands, and shall not be liable to be invalidated by reason of any doubt or question as to the sufficiency in the number and interest of the parties entering into such agreements: Provided always, that it shall be lawful for the said commissioners, by themselves, or by some assistant commissioner, at their discretion, if the circumstances of the case shall in their opinion require it, to direct that the rent-charge to be paid by any particular tenant or tenants shall not commence until the period of the next act or event on which the fine or other manorial right for which such rent-charge shall be commuted would have become due and payable; and that the amount of such rent-charge shall be then increased in such pro-

portions as the said commissioners or assistant commissioners shall think proper."

Valuers, Appointment of.—By s. 24, valuers are to be appointed at a commutation meeting.

Valuation. — By s. 25 it is enacted, "that as soon as may be after the choosing such valuers, and after the confirmation of the said agreement, the said valuers shall apply to the said commissioners for instructions as to the duties to be performed by them pursuant to such agreement; and having received such instructions, shall proceed to make and send in to the said commissioners such valuations, apportionments, and schedules as they shall require; and whenever an even number of valuers shall be chosen, it shall be lawful for the said commissioners, by any writing under their hands and seals (to be communicated either together with or soon as conveniently may be after the said instructions), to appoint a fit and proper person to be an umpire between such valuers; and the decision of the umpire on the questions in difference between the valuers shall be binding on them respectively, and shall be adopted by them respectively in their valuation."

Valuers, Duty of. — By s. 26, valuers may enter the lands, &c., for the purpose of valuation, having previously made a solemn declaration.

Steward, Duty of. — By s. 27, steward to furnish information for the purpose of enabling valuers to make valuation, and otherwise to facilitate commutations under the act. The steward shall, in such manner as commissioners shall direct, on request by valuers or chairman of meeting, make a correct statement in writing of—

The tenants of the manor:

Description of their lands:

The amount of assessment to poor-rate:

Amount received for heriots in respect of each tenant for three times previous:

And any other information which the commissioners shall direct:

Shall produce same for inspection at the meetings, and allow extracts to be taken; and, upon request by valuers, deliver to them a copy of such schedule, or the parts which they may require for such statements and extracts; the steward to receive such sum as shall be agreed on, and fourpence for seventy-two words, for copies or extracts.

The steward shall also, within three calendar months after the signature of the agreement, or such time as the commissioners shall fix, make out and send to them such information as they may direct.

Power to make inquiries personally, or by letter sent by post, as to ages of tenants; and enactment that tenant refusing to give information shall not afterwards be allowed to object to age stated, unless the commissioners shall see cause to direct otherwise; and penalty on giving untrue statement.

Steward to give from time to time such other information to commissioners as they may require, with penalty on default.

By s. 28, the valuers are to take the particular circumstances of each case into consideration.

Valuation, Schedule of. — By s. 29, copies of schedules by valuers to be lodged with steward for inspection by all interested parties, without charge; and notice to be given as commissioners may direct, with penalty on refusal to allow inspection.

Notice to fix time for hearing objections; and at such meetings objections to be heard and determined by assistant-commissioner, with power to adjourn when requisite, and direct any further valuation, &c., to be made.

No lord of a manor or other person to be allowed to object without giving two days' previous notice of intention to object, unless upon cause shown to the satisfaction of the commissioners; such notice from a tenant to be left with the steward, and inspected by other parties with schedules. Forms of notices to be supplied to steward, and by him delivered to party applying.

After hearing and determining objections, assistant-commissioner to amend schedules; and power to him or commissioners to amend such valuations or schedules as to alterations by deaths, change in ages, &c., on satisfactory proof, by affidavit or otherwise, that such alterations are requisite.

Expenses of Commutation. — By s. 30 it is enacted, "that the expenses of the proceedings, &c., affecting any commutation under this act, shall (except in cases where, from special causes, the said commissioners shall direct otherwise, and then as they shall direct, and except in cases where the parties to the said agreement shall therein otherwise provide, and then as they shall have provided,) be payable in manner following: (that is to say), where the valuers shall be appointed by the tenants, the costs of the valuations, apportionments, and schedules shall be paid by the tenants included in the commutation in ratable proportion to the sum charged on their land respectively, under and by virtue of this act; but where the valuers shall be appointed by the lord and tenants as aforesaid, then, if not more than two shall be appointed, the lord shall pay half the costs, and the tenants as aforesaid shall pay half; and where more than two valuers shall be appointed, the lord shall pay one-third, and the tenants as aforesaid shall pay two-thirds; and in all cases of dispute or difference as to the amount of the costs, or the persons on whom any costs should fall, the commissioners have power to decide the same."

Schedule, by whom made. — By s. 31, after valuation the commissioners are to make a schedule. By s. 32, they are to inspect and point out errors therein; and by s. 33, are to deposit copies with the steward of the manor and clerk of the peace.

Notice of Agreement. — By s. 34 it is enacted, "that the said commissioners, if they shall see fit, before confirming any agreement, valuation, assessment, schedule, or apportionment, may require notice thereof

to be given in such manner as they shall direct to the person next in remainder, reversion, or expectancy of an estate of inheritance in any manor or lands, or any other person to whom they may think notice ought to be given; and may by themselves, or by some assistant-commissioner, hear and determine any objection made to such confirmation by any person so interested therein."

Errors in Agreement. — By s. 35 it is enacted, "that it shall be lawful for the said commissioners to correct or supply any manifest error or omission in any agreement, valuation, assessment, schedule, or apportionment, at any time after the same shall respectively have been made or confirmed, with the consent in writing of all the parties affected by such error or omission, but not otherwise."

Of Fines and Heriots. — By s. 36, lands to be discharged from the payment of all the lord's rents, fines, and heriots, and rights in timber, and a rent-charge and fixed fine to be paid in lieu thereof.

This discharge is to take place from the 1st of January next following the confirmation of the apportionment; and from that day, or from such time as shall be fixed by the commissioners, a rent-charge is to be payable; and a fixed fine, not exceeding five shillings, upon death or alienation, to be stated in the apportionment. The rent-charge (when it shall exceed twenty shillings) to be valued in bushels of wheat, barley, and oats, and variable according to the prices of such grain, in the same manner as the tithe commutation rent-charge, and to be payable half-yearly; or the commutation consideration may be only a fine payable on death or alienation, but to be valued in bushels of wheat, barley, and oats, and variable according to the prices for the time being of such grain.

The Rent. — By s. 37 it is enacted, "that in every case in which, by the agreement entered into as aforesaid, any rent-charge or rent-charges shall have been left subject, in certain events, to increase or diminution, the schedule of apportionment shall set forth the events on the happening of which such increase or diminution is to take place, and the amount or rate of increase or diminution respectively."

Valuers: Default in appointing. — By s. 38 it is enacted, "that if, upon the expiration of six calendar months after the confirmation of any agreement to be made as hereinbefore mentioned, no valuers shall have been appointed, or their valuation, apportionments, or schedules (as the case may be) respectively, shall not have been made, and sent to the office of the said commissioners, or if any valuer appointed under or by virtue of this act shall die or become incapable of acting, it shall be lawful for the said commissioners from time to time to appoint such competent person or persons as they shall deem fit as valuer or valuers, with the like powers and duties, and whose costs and expenses shall be payable in like manner as is hereinbefore provided with respect to valuers to be appointed and acting under any such agreement for commutation as aforesaid."

Disputes: Commissioners' Power in. — By s. 39, the commissioners are to hear and determine disputes touching any fines or other manorial payments or incidents, except mines, &c.

Appeal. — By s. 40, "persons dissatisfied with the decision may appeal by issue at law or on a case stated: provided always, that, after such verdict given and not set aside by the court, or after such decision of the court, the said commissioners or assistant-commissioners shall be bound by such verdict or decision; and the costs of every action, or of stating such case, and obtaining a decison thereon, shall be in the discretion of the court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the court; and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said court."

Proceedings not to abate. — By s. 41 it is enacted, "that no proceedings of or before the said commissioners or assistant-commissioners, or in any action, or in any case stated, or reference, in pursuance of this act, shall abate or cease by reason of the death of any person interested therein. And by s. 42, in case of death of parties before actions brought, &c., the same to be brought and carried on in their names.

Witnesses. — By s. 43, witnesses may be subpœnaed and examined; and papers, &c., are to be produced; and s. 44 regulates the expenses of witnesses.

Of the Rent-charge. — By s. 45 it is enacted, "that every tenant or occupier who shall pay any such rent-charge as aforesaid, or any expenses legally chargeable under this act upon the land, of which he shall be such tenant or occupier, shall be entitled to deduct the amount from the rent payable by him to his landlord, and shall be allowed the same in account with his landlord."

Exemption. — By s. 46 it is enacted, "that in every case in which any tenant or occupier shall show to the commissioners that he holds copyhold lands for a term of years of a tenant of any manor at a lower rent than the sum about to be imposed on the same for commutation or enfranchisement, or for the expenses incurred under the provisions of this act, it shall be lawful for the said commissioners to declare all agreements entered into under the authority of this act null and void so far as regards such lands, and such lands shall be exempted from the provisions of this act, unless the tenant on the court-roll shall give such security for the payment of all sums to be charged on such lands as shall be satisfactory to the said tenant or occupier, and to the commissioners."

Remedy for Rent-charge. — By s. 47 it is enacted, "that in case the said rent-charge shall at any time be in arrear and unpaid

for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years, provided that not more than two years' arrears shall at any time be recoverable by distress."

And by s. 48, when rent-charge is in arrear for forty days after half-yearly days of payment, and no sufficient distress on the premises, writ to be issued directing sheriff to summon jury to assess arrears.

And by s. 49, the court out of which the writ shall have issued, or any judge at chambers, may order the owner of the rent-charge to account for the rents and produce of the lands, and to pay over the surplus (if any), to the person entitled, and thereupon a writ of *supersedeas* may issue. Court or judge, by rule or order, may give summary relief.

By s. 50, the powers of 4 & 5 Wm. 4 are to extend to rent-charges under this act (the 4 & 5 Vict.).

Commutation of Fines, &c.—By s. 51 it is enacted, "that nothing in this act contained shall affect any right to any rents, fines, or heriots, or any other manorial right proposed as the subject of commutation, which shall have become due or shall have accrued on or before the first day of January next following the confirmation of the apportionment."

Voluntary Commutation.—By s. 52, the lord and any one or more tenant or tenants of any manor (whatever may be their respective interests), may enter into an agreement with the consent of the commissioners for the commutation of the lord's rights to rents, fines, and heriots, and any other of the lord's rights, in consideration of a rent-charge variable as before mentioned (where it shall exceed 20*s.*), and of a small fine certain (not exceeding 5*s.*), on death or alienation; and such agreement may include an apportionment of the rent-charge or other consideration for commutation, and of the expenses, &c. If twelve or more tenants agree, a schedule may be made by steward. Notice to be given to remainder-man. Commutation may be made by an absolute conveyance, or by an agreement to be enrolled on the court-rolls of the manor.

By s. 53, powers of lords of manors to recover commutation fines.

By s. 54, power to effect supplemental or substituted commutation.

Apportionment of Rents and Fines.—By s. 55, any apportionment of commutation of rents or fines to be effected by an entry of apportionment on the court-rolls, as now done in case of apportionment of quit-rent.

Enfranchisement.—By s. 56, for the purpose of affording to the lords and tenants respectively the opportunity of effecting enfranchisements, it shall be lawful for the lord and tenants of any manor (whatsoever may be their estate or interest therein), with the consent of the commissioners under this act, to enfranchise any of the lands holden of the said manor in consideration of a sum of money to be agreed between them and the tenant affected, and certain facilities are given to such enfranchisements and cases of disabilities provided for.

How Effected.—By s. 57 it is enacted, "that if such agreement for enfranchisement shall not be entered into by all the tenants of the manor, or their number shall be less than twelve, or whatever may be their number, if the parties shall think fit, an enfranchisement may be effected with the consent of the said commissioners, by such conveyance, deed, or assurance, as would or might be adopted for effecting such enfranchisement if the lord were seised of the manor for an absolute estate of inheritance in fee-simple in possession."

And by s. 58, commissioners, before giving their consent to the agreement, shall, upon the written request of any three or more tenants, parties thereto, satisfy themselves of the title to the manor; and the expenses of that investigation, as well as the general expenses, shall be borne by the parties, as may be agreed upon; and in default, as the commissioners shall direct. In case the lord shall refuse to afford the required information, the agreement to be null and void.

Payment of Enfranchisement Money.—By s. 59 it is enacted, "that in all cases in which the lord for the time being shall be only entitled to the manor for a limited estate, or interest therein, or shall be under any legal disability, the sum or sums of money to be paid for enfranchisement shall be paid and applied in manner hereinafter provided for."

By s. 60, power to tenants to defer in certain cases payment of a portion of the consideration for enfranchisement until the next event at which a fine would be payable.

By s. 61, when the sum becomes due, the lord shall be entitled to the rents and profits of the land, and may proceed to obtain possession, as in like cases of default.

Power to Tenant to defer Payment of Consideration for Enfranchisement.—By s. 62 it is enacted, "that it shall be lawful for any tenant at any reasonable time after the execution of the agreement for enfranchisement (to be fixed by the commissioners, or, in default of their fixing any other limit, at any other time, or until within ten days next previous to the delivery by the steward to the commissioners of the schedule of apportionment), to declare, by notice under his hand, to be delivered to the lord or steward, as in cases of other notices, his desire that such compensation shall remain a charge on the lands affected thereby for any number of years, not exceeding fourteen, or, as to tenants for life, for the whole period of his life, and one year longer, and which no-

tices the said steward shall forthwith, or with the schedule of apportionment, send to the commissioners; and thereupon the said commissioners, with the consent of the lord, but not otherwise, shall insert in a column of the apportionment to be appropriated to that purpose, the number of years or period for which such charge is to be continued, and thereupon (subject as after mentioned) no proceeding shall be instituted during such term or period to enforce payment of the principal money so apportioned: Provided that lawful interest shall be paid half-yearly on the days to be mentioned in such apportionment, or if not mentioned therein at the expiration of each half-year, computed from the date thereof, and that such proceedings may be instituted; and nothing in the act contained shall extend to protect any tenant or other person from such proceedings in case one and a-half year's interest shall remain due on the said principal sum apportioned, or on any part thereof, to the extent of one-half: Provided also, that during the term so fixed the lord shall not be compellable to receive payment of the principal money without receiving twelve calendar months' notice of intention to pay off the same, and that in case the interest on such principal sum shall be in arrear thirty days, it shall be lawful for the party entitled to receive such interest money to levy the same by distress and sale of the goods on the lands and tenements enfranchised and affected by such enfranchisement money."

By s. 63, where payments are deferred by tenants, provision made as to lords being tenants for life.

Substituted Titles.—By s. 64 it is enacted, "that all lands which shall be enfranchised under this act shall be deemed to be held under the same title as that under which the same were held at the time of such enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims, or demands affecting the manor of which the same were holden."

Expenses and Recovery.—By s. 65, expenses of valuations and of making copies of apportionments and schedules, &c., required under the provisions of this act, and all expenses attending commutations or enfranchisements (except otherwise provided for), shall be paid as commissioners may, in apportionment or otherwise, under their hands and seals direct; and if any difference shall arise as to amount to be paid by or to any person, the commissioners, or assistant-commissioner, may under their or his hand certify amount; and in default of payment the same may, on production of certificate, or of a deposited copy of apportionment, be recovered before two justices of peace, by distress and sale, with costs of application and proceedings.

Action for Expenses.—By s. 66, if expenses not levied within two calendar months after warrant of distress granted, the person entitled (if the same, including costs of distress, shall amount to forty shillings), his executors, &c., may recover same with costs of suit, in any court of law at Westminster, against party named in certificate of apportionment, his executors, &c., in which action such certificate or copy of apportionment shall be satisfactory evidence of the amount of such expenses, and of the same being due from and to the parties therein named; and the certificate of such justices under their hands shall be evidence of the costs of such application, and the warrant which they are required to give in such cases shall be satisfactory evidence of non-recovery of such expenses and costs under the distress.

Expenses of Trustees.—By s. 67, "every tenant of the manor being a trustee (save as against an unadmitted mortgagee) shall be entitled to recover in like manner by distress or action respectively all expenses, costs, and charges, which he may have to pay under any such certificate, apportionment, distress, or action, from the person beneficially interested at the date of such apportionment in the land, his executors, &c., or by like distress on the land, and the occupiers thereof shall be entitled to deduct any such payments from any rent then or subsequently due; and should any dispute arise as to any trusteeship or right to recover, the same shall be determined by the commissioners or assistant-commissioners, as in the case of causes of difference before mentioned; the like evidence of certificate, &c., to be admitted in any such proceedings or action."

Costs.—By s. 68 it is enacted, "that any tenant having a limited interest, and who shall pay such expenses or costs, may, with the consent of the said commissioners under their hands, and by a simple entry on the court-rolls of the manor-court (and for which entry the steward shall only charge thirteen shillings and four pence, and which shall not be subject to any stamp-duty), charge such expenses and costs, with interests thereon, at the rate of four pounds per centum per annum, on the copyhold lands to which the same shall relate; but so, nevertheless, that the principal charge on such lands shall be lessened in every year following such charge by one-twentieth part at least of such original charge thereon, and shall be subject to previous mortgages."

The Lord's Right to Expenses.—By s. 69 it is enacted, "that any lord of a manor having a particular interest, or being a trustee, and who shall (in the case of a commutation) pay any such expenses or costs, may, with the like consent of the said commissioners, charge such expenses and costs, together with the expenses he may reasonably incur in employing agents to protect his interests, or otherwise, with interest thereon at the rate of four pounds per centum per annum on the manor to which the same may relate; but so, nevertheless, that the principal charge on such manor shall be lessened in every year following such charge by one-twentieth part at least of such original charge thereon, and shall be subject to

previous mortgages: Provided always, that the amount of such last-mentioned expenses shall have been previously submitted to, and shall have received the approval of the said commissioners, or of an assistant-commissioner."

Enfranchisement where a Mortgage.—By s. 70, "from and immediately after date of final confirmation and apportionment, the several and respective lands holden of the manor shall stand chargeable with the respective sums mentioned in the apportionment as payable to the lord and steward respectively, with the lawful interest from that day until payment; and the person or persons for the time being seised of the manor shall be deemed to be seised of the said lands as mortgagee in fee thereof for the benefit of the lord as to the sums payable to him, and of the steward as to the sums payable to him; and that (subject to the power of continuing the charge as hereinbefore provided) it shall be lawful for the person so seised, or the lord or steward respectively in his name, from time to time to adopt such means and proceedings as a mortgagee in fee of freehold lands is entitled to for the enforcing payment of such principal sums and interest, and with the like right to obtain payment of all attendant and incident costs."

To be First Charges.—By s. 71, such sums shall be first charges, and have priority over all mortgages, charges, and incumbrances, &c. (tithe rent-charge alone excepted).

Power to Mortgage.—By s. 72, "any tenant whose lands shall be enfranchised may charge the same (or any of them, if he holds all under the same and for the same estate) with payment of such sums and costs of such charge, and lawful interest, to any person advancing same, and his executors, administrators, and assigns; and for securing payment thereof to demise lands by way of mortgage, for any term of years, to such person, his executors, &c., or to such other person as he shall appoint; such demise to be made with a proviso or condition, declaring the term to be void on payment to the amount thereby secured, with interest at a time to be therein appointed, and such charge shall have the like priority, &c., with powers and rights of first mortgagee."

To whom Monies for Enfranchisement from Lord's Rights to be Paid.—By s. 73, monies to be received for enfranchisement from lord's rights to be paid to lord, his heirs or assigns, when absolutely entitled as tenant in fee; but when he shall be only entitled for limited estate or interest, or shall be under legal disability, such money to be paid as follows:—If it amounts to two hundred pounds, to be paid into the Bank of England under the 1 Geo. 4, c. 35.

When less than Two Hundred Pounds and more than Twenty Pounds.—By s. 74, to be paid into the Bank of England, or to trustees, at the option of the parties entitled for the time being to the said manor.

Not exceeding Twenty Pounds.—By s. 75 it is enacted, "that when any money so to be paid as last hereinbefore mentioned shall not exceed the sum of twenty pounds for all the enfranchisements in such manor, the same shall be paid, if the said commissioners shall so direct, to the respective parties for the time being entitled to the said manor, for his own use and benefit, or, in case of coverture, infancy, idiotcy, lunacy, or other incapacity, then such money shall be paid for their use to their respective husbands, guardians, committees, or trustees; and in case any dispute shall arise as to the proper application, appropriation, or investment of any enfranchisement money according to the intentions of this act, it shall be lawful for the said commissioners to decide such question, and their decision shall be final and conclusive thereon."

Payment to Lord not entitled thereto.—By s. 76 it is enacted, "that if any principal money shall be paid for enfranchisement to the lord of any manor not entitled by the provisions of this act to receive the same, the land in respect of which such principal money shall have been so paid shall continue charged with the payment thereof in favour of the person legally or equitably entitled to the same, but with such remedies against the person who shall have wrongfully received such money as purchasers are entitled to by the rules of law or equity."

Payment to Stewards.—By s. 77 it is enacted, "that all sums payable under this act for compensation to the steward shall be paid to him, his executors, or administrators."

Receipts.—By s. 78 it is enacted, "that the receipts of the persons to whom any sums of money shall be paid pursuant to this act shall be sufficient discharges for the same, and the person making such payment shall not be liable to see to the application of any such sums, or be answerable for the misapplication or non-application thereof; and for the better evidencing such payment the steward for the said manor for the time being shall, as to steward's compensation, forthwith after payment thereof, and as to the payments for enfranchisements from the lord's rights forthwith after production of receipts for the same, signed by the party entitled to sign the same, enter on the copy apportionment, to be deposited with him as aforesaid, a memorandum of such payment, and which memorandum shall in like manner as such receipt be deemed sufficient evidence of such payment, and discharge the lands and the person paying the same from the sums mentioned to be paid."

Confirmation of Apportionment.—By s. 79, in cases of commutation, the customary modes of descent to cease, and the lands to descend and to be subject to dower and courtesy in like manner as freehold lands. But land still to be held by copy of court-roll, and be conveyed by surrender and admittance. As to dower and courtesy, act not to apply to certain cases.

Gavelkind Lands exempt.—By s. 80 it is enacted, "that nothing in this act contained shall extend, or be held, deemed, or con-

strued to extend in any respect to affect, alter, or vary the custom of gavelkind as the same now exists and prevails in the county of Kent: but the same custom shall in every respect prevail and continue to prevail and be exercised in the said county in the same manner and to the same extent in all respects and particulars after this act shall have passed, as it has prevailed and existed heretofore, anything herein contained notwithstanding."

Lands to become Freehold.—By s. 81 it is enacted, "that in the case of any enfranchisement under this act, from and after the final confirmation of the apportionment, or the execution of the conveyance (as the case may be), the several lands therein respectively comprised and enfranchised shall become and be in all respects of freehold tenure, but subject to the payment of the enfranchisement consideration in favour of the lords and stewards or other officer as aforesaid; and all mortgages affecting the same shall be deemed and become mortgages of the freehold of the same lands for a corresponding estate, if such enfranchisement consideration shall be paid off, and if not paid off, mortgages of the equity of redemption thereof, subject to such mortgage interest as aforesaid for securing such consideration: Provided always, that nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto notwithstanding the same shall have become freehold: Provided also, that no such enfranchisement or conversion into freehold shall affect, except as aforesaid, any mortgage, or defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement or conversion."

The Lord's Rights.—By s. 82, no commutation under the act to affect rights of lords of manors to escheats, fairs, markets, apportionments, franchise, royalties, rights of chace, and in game, fisheries, &c., or any rights in mines or minerals. Nothing contained in the act to operate to empower any lord of a manor to inclose any common or waste lands in any part thereof. By s. 83, this act not to prevent any commutation or enfranchisement that may be made independently of this act.

By s. 84, power to tenants to grant rights of entry and way, &c., to lords for mining purposes.

By s. 85, courts of equity may decree a partition of lands of copyhold or customary tenure.

By s. 86, lords of manors, or their stewards, may, after 31st of December, 1841, hold customary courts, although no copyhold tenant be present.

By s. 87, lords, or their stewards, may, after 31st of December, 1841, make, out of the manors and out of court, grants of land to be held by copy of court-roll.

By s. 88, lords, or their stewards, may, after 31st of December, 1841, grant admissions out of the manors and out of court.

By s. 89, after 31st December, 1841, every surrender, &c., delivered to the lord or steward, and every fact proved to the lord or steward, at any court whereat a homage shall not be assembled, shall be forthwith entered on the court-rolls.

By s. 90, after 31st of December, 1841, presentment by the homage shall not be essential to the validity of an admission.

By s. 91, lords of manors in certain cases not to grant any common or waste lands without consent of the homage of the manor.

By s. 92, power to lords to grant licenses to tenants to alienate their ancient tenements in portions where they are now restrained by the custom from so doing.

By s. 93, agreements, &c., not to be liable to stamp-duties. No agreement, award, schedule of apportionment, or power of attorney made, or confirmed, or used under this act, chargeable with any stamp-duty.

By s. 94, false evidence to be deemed perjury; withholding evidence a misdemeanor.

By s. 95, limitation of actions against commissioners, assistant-commissioners, justices of the peace, &c.

By s. 96, proceedings under this act not to be quashed for want of form, nor to be removed by *certiorari*.

By s. 97, certain provisions of this act to extend to Crown manors and lands.

By s. 98, act to apply to Crown lands only where expressly provided.

By s. 99, act not to extend to the Duchy of Cornwall.

By s. 100, act to extend to England, Wales, and Ireland.

By s. 101, act may be altered this session.

Interpretation Clause.—By s. 102 it is enacted, "that in the construction, and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word 'manor' shall extend to a manor or reputed manor, of whatever tenure the same may be, or to such portion or portions of a manor as the said commissioners shall, by any order in writing under their hands and seals, with the consent of the lord of the manor, signified by writing under his hand and seal, direct to be considered as a manor for the purpose of affecting any commutation or enfranchisement under this act; the words 'lord' and 'steward' shall include the person or persons for the time being filling those respective characters, or acting in those respective capacities, whether those persons shall be rightfully or lawfully entitled to fill such characters, or act in such capacities or not, and the word 'steward' shall also include the clerk of any manor; the words 'tenant' or 'tenants' shall comprise all persons holding by copy of court roll, or as customary tenants, or holding lands subject to any manorial rights, and whether holden to them and their heirs, or whether granted to two or more to be

(*a*) *Connected with his Right of Property.*[1]
(*b*) *To appoint a Steward.*[2]

granted in succession, or holden for life or lives, or years; the words 'land' or 'lands' shall extend to and comprise lands holden by copy of court-roll, or by custom of any manor, and lands holden of any lord of a manor in ancient demesne, and whether in fee or for life or lives, or for years, and shall also comprise all lands holden of a manor, subject to any manorial rights, and shall extend to messuages, tenements, and corporeal or incorporeal hereditaments, subject to manorial rights, or any undivided part or share therein; the word 'enfranchisement' shall extend to and include the discharge of freehold lands from heriots and other manorial rights; the word 'heriots' shall include payments in lieu thereof; the word 'rents' shall include 'reliefs' and 'services,' not being service at the lord's court; and the word 'person' shall mean and include any body politic, or corporate, or collegiate, as well as an individual; and every word importing the singular number only shall mean and include several persons or parties as well as one person or party, and several things as well as one thing respectively, and the converse; and every word importing the masculine gender only shall mean and include a female as well as a male."

See also 1 Geo. 4, c. 35; 11 Geo. 4, & 1 Wm. 4, c. 65; 2 & 3 Wm. 4, c. 80; 4 & 5 Wm. 4, c. 22; 6 & 7 Wm. 4, c. 71; and 2 & 3 Vic. c. 62, s. 7, which enacts, "that in every case of merger of tithes, or rent-charge issuing out of land of copyhold tenure, and subject to arbitrary fine, it shall be lawful for the said commissioners, on the application of the owner of such land, to ascertain, by such ways and means as they shall think fit, the annual value of the tithes or rent-charge so merged or intended to be merged; and the said commissioners shall in such case cause to be indorsed on the deed, declaration, or other instrument affecting such merger, a certificate under their hands and seals, setting such annual value so ascertained; and in every case of future assessment of fine on the lands, which, before such merger, were subject to such tithes or rent-charge, the parties entitled to such fine shall assess the same as if such lands were subject to the tithes or rent-charge of which the annual value shall be so indorsed; and the production of such deed or instrument of merger, or of a duplicate thereof, with such certificate indorsed, or of an office copy of such deed, declaration, or instrument, and certificate indorsed thereon, shall be sufficient evidence of the annual value of such tithes or rent-charge."

Under 4 & 5 Vic. c. 35, the enfranchisement was voluntary: but by a more recent one (15 & 16 Vic. c. 51) the enfranchisement of copyhold lands is made compulsory, at the instance of either lord or tenant; but such enfranchisements are not to affect the estates or rights of either party in any mines or minerals within or under the lands so enfranchised, or any other lands. When all parties are *sui juris*, and agree to an enfranchisement, it may be made by a simple conveyance of the fee-simple from the lord to his tenant. *See* also 6 Vic. c. 23; 7 & 8 Vic. c. 55; 14 & 15 Vic. c. 104; 16 & 17 Vic. c. 124; 21 & 22 Vic. c. 94; 24 & 25 Vic. c. 78.

[1] The freehold of all lands granted by copy remains in the lord (29 L. J. C. P. 7), who consequently continues to enjoy a variety of rights over those lands. Thus, in the absence of a special custom, the right to the timber, mines, and minerals, continues in the lord; but the lord of a manor is not authorised to enter on a copyhold of inheritance and cut timber for his own use, if there be no custom in the manor (*Whitechurch v. Holworthy*, 4 M. & S. 340; S. P. *Ashmond v. Ranger*, 12 Mod. 378; S. C. 11 id. 18; S. C. Com. 71; S. C. 1 Lord Raym. 551; S. C. Holt, 162; S. C. Fort. 152); and on the same principle, the lord cannot enter copyholds to work the mines underneath, unless authorised by special custom. *Bourne v. Taylor*, 10 East, 188; S. P. *Player v. Roberts*, W. Jon. 243. *See* as to brick earth, 30 L. J. Ex. 3.

The court will not grant a *mandamus* to compel the lord of a manor to grant a license to a copyholder to demise his copyhold lands, on an alleged custom that the tenant might demise for three years without license, and that the lord was entitled to a certain annual payment for every year of a longer term upon his license to demise during such longer term. *Reg. v. Hale*, 9 Ad. & E. 339; 1 Per. & D. 293. *See* 1 Scriv. Cop. 544.

As to Quit Rents.—The lord of a manor on a grant of a copyhold tenement can neither add to, nor diminish, the ancient rent. *Doe d. Rayer v. Strickland*, 2 Q. B. 792; 11 L. J. Q. B. 305. *See* 1 Scriv. Cop. 421.

[2] As an incident to the lordship of the manor, the lord may appoint a steward. When a steward is appointed by deed, he becomes possessed of the office *dum bene se gesserit*. In one case it is said that the office of steward may be entailed (7 Co. 13, b.); and in Sir Edward Coke's time the office seems to have been capable of descent. Co. Tr. 107. The office may be, however, in all cases forfeited by misuser, nonuser, or refuser, which three cases of forfeiture are thus stated by Coke (Cop. s. 45, tr. 106):—"1st. By abuser: as if the steward burn the court-rolls, or if he taketh a bribe to wink at any offence, or use partiality in any cause depending before him. 2dly. By nonuser: as if the steward, by his patent being tied to keep court at certain times of the year, without request to be made by the lord, faileth, and by his failure the lord receive any prejudice, this is a forfeiture; but if the lord be not damnified, then this nonuser is no forfeiture. 3rdly. By refuser: as, if the steward, tied by his patent to keep

(c) *Of the Manor-Courts and Courts-Baron.*[1]

(B) *As to the Tenant.*

(a) *As to his Duties.*

(1) *Connected with the Payment of Fines.*[2]

court upon a demand or request to be made by the lord, if the lord demandeth or requesteth him to keep a court, and he faileth, this is a forfeiture, though the lord be thereby nothing damnified." And it may here be noticed that a court of law will exercise a summary jurisdiction over a steward, an attorney of the court. Co. Cop. s. 62. Should the steward be disturbed in his office, his remedy is by action on the case. Cro. Eliz. 335; 1 Scriv. Cop. 134.

It is not clearly settled that a steward can appoint a deputy without a custom or express warrant in his own authority. 1 Scriv. Cop. 146. Sir Edward Coke says he surely cannot, for it is an office of knowledge, trust, and discretion, except in cases of necessity; as, if the stewardship descend on an infant, he may make a deputy, because of his incapacity to execute it personally. Co. Cop. s. 46, tr. 107. In most of the cases that have occurred there has either been a custom, or the chief steward has been authorised by deed to execute his office by himself or his deputy's deputy. 1 Leon. 289; 4 id. 215; 1 Ld. Raym. 660; 1 Salk. 96; 1 Com. 84; 12 Mod. 470; 1 Leon. 227; Cro. Eliz. 48.

[1] A steward of the manor-court may be appointed for the life of the grantee, and the appointment binds future owners of the manor. *Bartlett v. Downes*, 3 B. & C. 616; 5 D. & R. 256; 1 C. & P. 522. The courts-baron should be held within the manor. *Doe d. Leach v. Whittaker*, 3 Mee. & W. 225; 5 B. & Adol. 409. *See ante*, p. 124.

It is a good custom in a manor for a steward to prepare the surrenders, and slight evidence will support such custom; it being more reasonable that the steward should prepare them for the copyholders. *Reg. v. Bishop's Stoke, Lord of Manor of*, 8 Dowl. P. C. 608.

[2] By the custom of many manors fines are due from copyholders on every change of the lord which happens by the act of God; but such rule cannot exist where the change takes place by any act of the party. *Duke of Somerset v. France*, 1 Stra. 654; Fortescue, 41; 1 Scriv. Cop. 383.

Where the jury find that the fine on admission is an "arbitrary" fine:—*Held*, that it did not mean that the fine was unreasonable. *Wilson v. Hoare*, 2 Per. & D. 659; 10 Ad. & E. 236. The fine must be reasonable. 30 L. J. Ex. 178.

Whenever the trustees of a charity were reduced to five, a new admission was requisite:—*Held*, that the fine payable was to be half of each preceding fine. *Wilson v. Hoare*, 2 B. & Adol. 350.

The surrenderee of the heir-at-law of the divisor must pay the descent fine before admittance. *Rex v. Dullingham, Lady of the Manor*, 1 Per. & D. 172.

No fine is payable on the admission of the remainderman, unless there be a custom. *Phypers v. Ebwin*, 3 Bing. N. S. 250; 3 Scott, 634. Where, therefore, a tenant for life is admitted, and a full fine paid, the remainderman is not subject to another fine. *Dean of Ely v. Caldecott*, 1 Bing. 439; 1 M. & Scott, 633. In *Phypers v. Ebwin* (*supra*) the court held that the admittance of tenant for life, being the admittance of him in remainder, the latter is not, on the death of the tenant for life, bound to come in and be admitted, and, consequently, pay a fine to the lord, except there is a special custom of the manor to such effect, or the lord at the time of the admittance has apportioned the fine between the tenant for life and the remainderman, although the fine paid by the tenant for life upon his admission be merely nominal.

Where a fine arbitrary is imposed, it is due to the lord as of common right, and it lies on the tenant to show that it was unreasonable. *Doe d. Twining v. Muscott*, 12 Mee. & W. 832; 14 L. J. Ex. 185. On assessing a fine proportionable upon the clear annual value of copyhold lands, the mode to calculate what the annual value is, is to consider it so much as it would yield to the copyholder if he occupied it himself, or so much as it would yield if he were to let it and repair it himself. The annual charge for repairs should enter into the calculation of the clear annual value of the lands. *Richardson v. Kensit*, 5 Man. & G. 485; 6 Scott, N. R. 419.

Where copyhold land was devised to A. for life, remainder to five persons as tenants in common, A. was admitted. After the death of A., the five tenants in common contracted to sell to B., and severally surrendered to the use of B. in fee. It was held, that B. on admittance was liable to pay five fees, and that the admittance required five stamps. *Reg. v. Eton College*, 8 Q. B. 526. See *Reg. v. Everden*, 16 L. J. Q. B. 18. And where the tenant for life and several remaindermen are all admitted at the same court-baron, the fines may be calculated on the same principle as those imposed on joint tenants. *Richardson v. Kensit*, 5 Man. & G. 485; 6 Scott, N. R. 419.

Where, according to the custom, the steward was entitled to one fee on the surrender and another on the admittance, the court held that, under the 95th section of the Lands Clauses Consolidation Act, 8 Vic. c. 18, he was entitled to one fee only on a surrender. *Cooper v. Norfolk Railway Co.* 3 Ex. 546; 18 L. J. Ex. 176. *See* further, as to fines upon admittance, *Curtis v. Scales*, 14 Mee. & W. 444; 14 L. J. Ex. 318. *Evans v. Upsher*, 16 Mee. & W. 675; 16 L. J. Ex. 185.

Where the surrenderee of the reversion of

(2) *Connected with Heriots.*[1]

(*b*) *As to his Privileges and Disabilities.*[2]

VIII. Relative to the Remedies the Lord and Tenant have to Protect their respective Rights.[3]

(A) *By Action.*

(*a*) *By whom Maintainable.*

Lewis v. Branthwaite, 2 B. & Adol. 437.

A copyholder has the same right to main-

In trespass, it appeared that the plaintiff was a copyhold tenant of the manor of Abercarne, in the county of Monmouth, of, among other lands, the

copyhold land died without having been admitted, and before the reversion came into possession, it was held that his heir was entitled to be admitted on the payment of a single fine. *Garland v. Alston*, 27 L. J. Ex. 438.

Where an offer is made to pay part of a demand protested against as excessive, which offer is refused, and the whole sum paid under protest, the party so paying is not precluded from afterwards disputing any part of the original demand that may be excessive, and recovering it in an action. *Treherne v. Gardner*, 25 L. J. Q. B. 201.

In an action to recover fines, if the fines demanded be unreasonable, the plaintiff is not entitled to recover on a *quantum meruit*. *Hayward v. Raw*, 30 L. J. Ex. 178.

[1] With respect to heriots, important alterations are introduced in the 4 & 5 Vic. Besides a fine, there is also a custom in many manors, that upon the death of every copyholder, though only for life, the lord becomes entitled to his best beast, or *averium*. So, by custom, it may be due upon the surrender or alienation of the tenant. In some manors, it is the best chattel, under which a jewel or piece of plate is included; but it is always a personal chattel, which, immediately upon the death of the tenant, being ascertained by the option of the lord, becomes vested in him as his property, and is no charge on the land, but merely on the goods and chattels of the tenant. *See* 1 Cruise's Dig. 323; 2 Watk. 127; Scriven, 422; and Fish. on Cop. 71. Heriots are not peculiar to copyhold estates. They are sometimes found attached to freehold estates, which are held by service and suit of court; such freeholds being commonly called "suithold estates," and are for the most part enfranchised copyholds, the heriot being still due by custom. The law relative to this subject will, therefore, be more properly classed under Heriot. *See* 1 Scriv. Cop. 437.

If one heriot be chargeable upon copyhold, and several if divided, if it becomes united again only one heriot can be demanded. *Garland v. Jekyll*, 2 Bing. 273. *See* 1 E. & B. 184; 5 Jur. 676.

Under a custom that if a heriot be not given 40*s.* shall be paid in lieu thereof, the lord can only claim the fine. *Croome v. Guise*, 4 Bing. N. S. 148.

A heriot may be due by custom upon the death of a free tenant holding an estate in fee simple. *Damerell v. Protheroe*, 10 Q. B. 20; 16 L. J. Q. B. 170. *Price v. Woodhouse*, 3 Ex. 616; 18 L. J. Ex. 271. Where a customary heriot of the best beast is due on the death of the tenant, no property in any beast vests in the lord until he has made the selection. *Abington v. Lipscombe*, 1 Q. B. 176; 1 Gale & D. 230.

Where, by the custom of a manor, every copyhold tenant holding lands of the lord was bound to pay a heriot to the lord, and also a fine at the will of the lord upon death or alienation, it was held that the lord was entitled to one heriot only on the alienation of a tenement held by four joint tenants. *Padwick v. Tyndale*, 28 L. J. Q. B. 90.

[2] The tenant, who acquires an indefeasible estate in the premises, is no longer, as in former times, a martyr to the military sway and despotic caprice of the lord of the manor. *Rex v. Lucas*, 10 East, 235. A copyhold qualifies a copyholder to inspect the court-rolls (*Bateman v. Phillips*, 4 Taunt. 162), although no suit be pending at the time. *Rex v. Tower*, 4 M. & S. 162.

A copyholder cannot make a partition without the consent of the lord. *Rex v. Southwood*, 5 M. & R. 414. A copyholder has no right to convert to his own use large stones which have fallen from the adjoining cliff and are embedded in the land at the time of his admission. *Dearden v. Evans*, 5 Mee. & W. 11.

A custom for copyholders of inheritance without license from the lord to break the surface and take clay without limit from their copyhold tenements for making bricks, to be sold off the manor, is good. *Marquis of Salisbury v. Gladstone*, 30 L. J. Ex. 3.

A lease by a copyhold tenant for a period longer than that warranted by the custom of the manor, or in other respects not in accordance with the custom, is not absolutely void. It is good as between the lessor and lessee, and all others, except the lord of the manor, who may take advantage of it as a ground of forfeiture. *Doe d. Robinson v. Bousfield*, 6 Q. B. 492; 14 L. J. Q. B. 42. *Doe d. Tressider v. Tressider*, 1 Q. B. 416; 10 L. J. Q. B. 160.

No presumption will be made against the right of a party to devise his copyhold estate. *Doe d. Dand v. Thompson*, 15 L. J. Q. B. 88; 10 Jur. 28.

[3] The heir of the devisor may maintain ejectment without admittance. *Doe v. Crisp*, 1 Per. & D. 37.

tain an action as a freeholder.

close in question; and the defendant, who was in possession of a colliery lying under land adjoining that of the plaintiff, opened a level under the plaintiff's close, for the purpose of taking out coal. There was no evidence that the defendant had ever trespassed on the surface; and it was, therefore, argued by the counsel for the defendant, that an action for a trespass to the subsoil could not be maintained by the plaintiff, he being a copyhold tenant, and in possession of the surface only, the mines and trees being the property of the lord. The jury were directed by *Bolland, B.*, to find a verdict for the plaintiff. On motion for a nonsuit,—

Per Cur. It is not denied that a freeholder, or one holding under him for life, for years, or at will, has possession of the soil from the surface to the centre of the earth; but it is said, that there is a distinction in this respect between a copyholder, who is the tenant at will of the lord, and a tenant of a freeholder, that, as the absolute property in the freehold is in the lord, the property in the mine must be in him; and that, as the plaintiff could not make any use of these minerals, he cannot maintain an action against a wrongdoer for committing a trespass in the soil below the surface. But if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the subsoil belonged to him. We are of opinion, that, although the property in the mine may be in the lord, he has not such a possessory right in it as to entitle him to maintain trespass against a wrongdoer; and that the copyhold tenant has such a possessory right, and may recover substantial damages for any actual injury done to the surface, and nominal for a trespass committed below the surface.

(*b*) *As to the Court where they are to sue.*[1]
(*c*) „ *Form of Action.*[2]
(*d*) „ *Evidence.*[3]

DOE D. HAWTHORN v. MEE, 1 Nev. & M. 424.

The title of a copyholder is established by producing stamped copies of the surrender and admission.[4]

In ejectment, for the purpose of making out the title of Hawthorn, a stamped copy of a surrender of the premises from the father of the defendant to Hawthorn as mortgagee, and a stamped copy of an admission of the latter, were produced in evidence. It was objected on the part of the defendant, that the stamped copy of the surrender, which had been made out of court, ought not to be received in evidence, but that the lessor of the plaintiff was bound to

[1] It is not imperative on the litigant parties to submit to the customary court, where justice cannot be obtained; as, for instance, where disputes arise between lord and tenant, it must of necessity be referred to the courts above, as the lord must not be both party and judge.

[2] In an action for a copyhold fine, the real value is the test, and not the rent reserved. *Lord Verulam v. Howard*, 7 Bing. 327; 5 M. & P. 148. The statute of limitation runs from the right of entry. *Doe d. Sweeting v. Hellard*, 9 B. & C. 789. The lord's executors as his representatives may recover. *Shuttleworth v. Garnett*, 3 Lev. 261; Carth. 90; 1 Show. 35; 3 Mod. 239.

[3] The record book of admittance is evidence of a surrender where the original surrender has been lost. *Rex v. Thrusecrop*, 3 Nev. & M. 284; 1 Ad. & E. 126. Where the surrender of a copyhold was by a power of attorney, held that the court-roll stating it to be by power of attorney was secondary evidence of the power of attorney if it could not be found. *Doe v. Caperton*, 9 Car. & P. 113. If the evidence proves a custom to bar estates tail in copyhold lands by recovery and surrender, the question for the jury must not be in the alternative. *Doe d. Wulhead v. Ossingbrooke*, 9 Moore, 68. In ejectment for copyhold, the court-rolls of the manor containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his inheritance, are evidence of his title against the alleged surrenderor. *Doe d. Garrod v. Olley*, 4 Per. & D. 275.

[4] A copy of court-roll admitting a surrenderee in trust for the grantee of an annuity, there stated to be secured by the bond of the purchaser, and subject thereto to the use of the purchaser, his executors, administrators, and assigns, requires an *ad valorem* stamp in respect of the purchase-money expressed to be so paid by the purchaser to the surrenderor, but without reference to the annuity, whether the statement is taken to refer to an annuity already granted, or to an annuity to be created in future. *Doe d. Chapeau v. Reynolds*, 2 Nev. & M. 383.

The determination of a copyhold interest

produce the original deed of surrender properly stamped. *Lord Denman, C. J.*, directed the jury to find a verdict for the lessor of the plaintiff.

Per Cur. The Stamp Act,[1] 48 Geo. 3, c. 149, has required, that in one case the deed of surrender shall be stamped, in another that the stamp shall be upon the copy of the court-roll; but this was a mere matter of convenient arrangement, the legislature thinking that the payment of the revenue would by this means be most effectually secured. This was not intended to alter the rules of evidence, and we cannot depart from those rules, because, by adhering to them in a particular case, there is a possibility that the revenue may be injured. This case falls within the general rule that examined copies of the rolls of a court are evidence.

(B) *By Distress.*[2]

(C) *By Customary Plaints.*[3]

(D) *By Writ of* Mandamus.[4]

COPYRIGHT.[5]

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may be shown without producing the copy of court-roll: as by the declaration of a party in possession, that his interest was for life only, that would be *primâ facie* evidence that his estate determined upon his death. *Doe d. Walsh v. Langfield*, 16 Mee. & W. 497.

[1] Now 55 Geo. 3, c. 184.

[2] The lord may distrain upon his copyhold tenant for non-performance of suit (Co. Litt. ss. 225, 226, 227; Gilb. Dis. 5; 2 Watk. 177; 2 Inst. 118; Noy. 135; S. C. 2 Brownl. 279); but the distress is considered as a pledge to compel the performance of the services, and cannot be sold. Yelv. 194; Cro. Jac. 256; 1 Bulst. 52; Gilb. Dist. 13. The lord may distrain for rents of assize of common right (Co. Litt. s. 213; Gilb. Dis. 5); and now by the 4 Geo. 2, c. 28, s. 5, all persons have the like remedy by distress for rents of assize, chief rents, and rents-seck (Gilb. Dis. 6), as in the case of rents reserved upon lease; and the statute extends to copyholds. Id.; Gilb. Ten. 150; 2 Watk. 181; 1 Scriv. Cop. 431.

[3] A copyholder in every action real may plead and be impleaded, in respect of his copyhold land, in the court of the manor of which it is holden; and therefore, in case of ouster by a stranger, he cannot implead him by the king's writ, but only by plaint in the lord's court, with protestation to prosecute his suit in the nature of a writ of entry, or of assize of novel disseisin, or of *mort d'ancestor*, or in the nature of the grand writ of right, the process upon plaints for copyhold lands being analogous to the common-law writs in real actions. And this rule equally applies to copyhold lands held of a manor of ancient demesne. Co. Cop. s. 57, tr. 118. *See* 1 Scriven, 541.

[4] As both the surrenderor and surrenderee are without remedy by action at law against the lord of the manor for refusing admittance, a *mandamus* will be granted. *Rex v. The Lord of the Manor of Hendon*, 2 T. R. 484. *Rex v. The Borough of Midhurst*, 1 Wils. 283. *Roe d. Noden v. Griffits*, 4 Burr. 1953. *Rex v. Coggan*, 6 East, 431; 2 Smith's Rep. 417. The lord and steward are also compellable by *mandamus* to permit the court-rolls to be inspected by any person claiming an interest under them. *Rex v. Lucas*, 10 East, S. P. 335. *Bateman v. Phillips*, 4 Taunt. 162. *Rex v. Tower*, 4 M. & S. 162. So, should the lord or his steward refuse to receive and enrol a surrender, it may be enforced by a *mandamus*. *Rex v. Rigge*, 2 B. & A. 550. Tapping on Mandamus, 159, 160.

The *mandamus* will issue to compel the lord to admit a person who claims as heir of a deceased copyholder, if he has made out a *primâ facie* case of title by descent according to the custom of the manor, even though the lord suggests that the tenement has escheated to himself for want of an heir. *Reg. v. Dendy*, 22 L. J. Q. B. 39; 1 B. C. C. C. 111. But it will not be granted if it appear that the title of the claimant has been barred by the statute of limitations. *Ex-parte Phillips*, 1 H. & W. 660. And a *mandamus* to admit will not issue to the steward of a manor belonging to the Crown, though he may have received his appointment from the Commissioners of Woods and Forests, under the 10 Geo. 4, c. 50, s. 14. *Reg. v. Powell*, 1 Q. B. 352; 4 Per. & D. 719. See *Reg. v. Richmond*, 1 Q. B. 352.

The *mandamus* to admit must be directed to the lord as well as the steward of the manor. *Reg. v. Powell*, 1 Q. B. 352; 4 Per. & D. 719; 1 Scriv. Cop. 158.

[5] Copyright is the exclusive privilege of multiplying copies of an original work or composition. 14 Mee. & W. 316. It has been considered by some that this right existed prior to the statute of Anne (8 Anne, c. 19); which statute, according to this view, first limited the term of an author's

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I. In Books.

(A) *What Works are Subject-matter of Copyright.*

Wright v. Tallis, 1 C. B. 893; 14 L. J. C. P. 283.

There can be no copyright in works *intended* to deceive purchasers; hence where a work of a devotional character falsely professed to be a translation from the German of an author who had a high reputation for writing of this kind, the object being to deceive purchasers, and give the work a value which it would not otherwise have possessed:—*Held*, there was no copyright.[1]

This was an action on the case for the infringement of the copyright of a book entitled *Evening Devotions; or, the Worship of God in Spirit and in Truth. From the German of C. C. Sturm.*

The defendant pleaded that Sturm had written and published in the German language books on religious subjects, which had been translated into the English language and had been, and were, much valued by the Queen's subjects; and that the plaintiff, well knowing the premises, employed one R. Huish to compose and write the book mentioned in the declaration, and first publish it; and wrongfully intending to defraud and to deceive the public, and to make them believe the book was a translation of an original book written by Sturm, and to purchase copies of it from the plaintiff, and to pay large sums of money to the plaintiff, under the belief that they were purchasing translations of an original work, fraudulently and deceitfully caused the said R. H. to compose and write the same book; and falsely, fraudulently, and deceitfully published the same to the public as and for a translation of an original work written in German by the said Sturm. That the plaintiff published with the book a false, fraudulent, and deceitful preface, the object of which was to induce the public to believe thoroughly and entirely that the book was really a translation of a work published by Sturm; and that the plaintiff falsely and fraudulently represented such to be the case to all the subjects of the Queen who then purchased the same. Demurrer.

Tindal, C. J. "The present case is perfectly distinguishable from those

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copyright; and according to the other view, first gave an author copyright in his productions. See *Miller v. Taylor*, 4 Burr. 2303. *Donaldson v. Beckett*, id. 2408; 7 Bro. P. C. 129. In this case the House of Lords held the common-law right, if any could not be exercised beyond the statutory period. *Boosey v. Jefferys*, 6 Ex. 522. The statute of Anne is no longer in force, and the copyright in books is now regulated by the 5 & 6 Vic. c. 45. In the United States, copyright rests wholly upon the legislation of congress; and *Lord Brougham*, in *Jefferys v. Boosey*, said it did not exist at common law; it was the creature of statute.

A copyright may be had in maps, charts, prints, cuts, engravings, and musical compositions, letters of a literary character, as well as in books. 2 Kent's Com. 373; 2 Atk. 342; Amb. 737. The copyright of a map is an exclusive right to the multiplication of copies for the benefit of the author or his assigns, disconnected from the plate or any other physical existence. It is an incorporeal right to print and publish the map, or, as said by *Lord Mansfield*, in *Millar v. Taylor*, "a property in notion, and has no corporeal tangible substance." *Nelson, J.*: 14 Howard's R. 530. *See* Curtis on Copyright; Godson, id.; 4 Esp. 97; 2 Camp. 511; 2 Mer. 438; 2 Stark. 107.

[1] Nor can there be in an obscene, libellous,

which have been referred to at the bar of books of instruction or amusement having been published as translations, whilst they have in fact been original works, or having been published under an assumed, instead of a true name. Such was the instance given of *The Castle of Otranto*, in professing to be translated from the Italian; and such the case of innumerable works published under assumed names, such as voyages, travels, biography, and works of fiction or romance, and even works of science and instruction, for in all these instances the misrepresentation is innocent and harmless. But the facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing on the name of an author who had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise, but it is to practise upon some of the best feelings of the public; namely, their religious feelings: and thus to induce them to believe that the work is the original work of the author whom he names, when he knows it not to be so. The transaction, therefore, ranges itself under the head of *crimen falsi*. It is a species of obtaining money under false pretences; and as the very act of publishing the work, and the sale of copies to each individual purchaser, are each liable to the objection above stated, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement. Cases in which a copyright has been held not to subsist, when the work is one which is subversive of good order, morality, or religion, do not indeed bear directly on the case before us, but they have so far an analogy with it that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. We think, for these reasons, the defendants are entitled to judgment."

(*a*) *With respect to the Works of Foreigners.*

BOOSEY v. JEFFERYS, 6 Ex. 581.

Lord Campbell, C. J. "If an alien residing in his own country were to

A foreigner may acquire a

or profane publication, nor in common correspondence, 20 Q. B. 27. Where an author adapted words of his own to an old air, and composed a prelude and accompaniment to it, it was held that he had a copyright in the combination. *Lover v. Davidson*, 1 C. B. (N. S.) 182.

A narrative of a voyage of discovery, prepared under the orders of the Crown, is the property of the Crown; but the publisher, under the order of the Board of Admiralty, who had the disposition of the profits, having no personal title:—*Held*, not entitled to an injunction to restrain a stranger from publishing. *Nicol v. Stockdale*, 3 Swanst. Ch. 687. As to copyright in the name of a work, 27 Bev. 53; 6 Jur. 1131.

The difficulty of separating the pirated matter from what is original, however valuable the latter, is no ground for the court refusing its protection to the former; nor, on an application for the purpose of such protection, will the court necessarily call on the plaintiffs for any explanation of their title, nor the mode of acquiring it: but *semble* where the pirated matter is small in comparison with the whole work, the court will leave the complaining party to his action at law; and it will not grant an injunction against the entire work until, by inspection or otherwise, it has ascertained the quantity of matter pirated, and in difficult cases, as in cases of encyclopædias, will refer it to the master to ascertain the extent of it. *Maxman v. Tegg*, 2 Russ. Ch. 385. An abridgment of, or quotations from, a work are lawful, although they may injure the sale of the original; but a compilation from a book is an infringement. 2 Hill on Torts, 193. The inquiry is, whether the defendant's publication is a legitimate use of the plaintiff's in the fair exercise of a mental operation. 17 Ves. 422. A copyright may be had in a translation. 3 C. & M. 77. Mere industry, such as preparing a price current, is no ground for protection. (Id.) So as to a chart. *Aut qu. see* 3 Kay & J. 708; 3 Jur. N. S. 1051.

The right or property of an author or composer of any work, whether of literature, art, or science, unpublished, and kept for his private use and pleasure, entitles the owner to withhold the same altogether, or so far as he may please, from the knowledge of others; and the court will interfere to prevent the invasion of this right by the publication of a catalogue containing a description of such work. *Prince Albert v.*

copyright here in a work composed abroad, if he first publish it in this country.[1]

compose a literary work there, and continuing to reside there, without having before published his work anywhere, should cause it to be first published in England in his own name and on his own account, he would be an author within the meaning of our statutes for the encouragement of learning, and that he might maintain an action in our courts against any one who in this country should pirate his work. We wish to be understood always as speaking of the rights of a foreigner who first publishes his work in England. It seems to be well understood in America, and in the states on the continent of Europe, that when a literary work has once been published in any country, the author can only claim the copyright vested in him by the law of the country where he publishes it, and as to all other countries it becomes *publici juris*. This is the doctrine of our courts, and the legislature must be considered as having adopted and sanctioned it by the enactments of the International Copyright statutes, 1 & 2 Vic. c. 59, and 7 & 8 Vic. c. 12."

(B) *Term of Copyright, and in whom it is Vested.*

Copyright endures for the life of the author, and seven years after his death, or for forty-two years if such period is shorter.

5 & 6 Vic. c. 45, s. 3, enacts, that "the copyright in every book which shall, after the passing of this act, be published in the lifetime of its author, shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in such case endure for such period of forty-two years;[2] and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."[3]

Strange, 1 M'N. & G. 25; 18 L. J. Ch. 120.

[1] In *Bentley v. Foster*, 10 Sim. 320, *Vice-Chancellor Shadwell* said: "If an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge by first publishing the work here, he is entitled to the protection of the laws relating to copyright in this country." *See* also *Page v. Townsend*, 5 id. 395. *Tonson v. Collins*, 1 W. Black. 301. *Bach v. Longman*, 2 Cowp. 623: *contra*, *Chappell v. Purday*, 12 C. & B.; 14 Mee. & W. 319.

If a foreign author resident abroad there assigns, according to the law of his domicile, his copyright to another foreigner, who assigns it in Great Britain to a British subject, the latter may acquire a copyright if the work be first published here. *Boosey v. Jefferys*, 6 Ex. 580.

A foreign author cannot, by assigning his copyright according to the law of his country, give the assignee a copyright which will be recognised in England so as to entitle the purchaser of it here to the right of exclusive publication. *Boosey v. Davidson*, 13 Q. B. 257; 18 L. J. Q. B. 174. *Cocks v. Purday*, 5 C. B. 860. *Boosey v. Jefferys*, 6 Ex. 580; 20 L. J. Ex. 354.

If a foreigner translates an English work, and then an Englishman re-translates the foreign work into English, that is an infringement of the original copyright. *Murray v. Bogue*, 1 Drew, 353; 22 L. J. Ch. 457.

[2] By s. 4, the copyright in subsisting rights is extended to the term provided with reference to new works, except it belong to an assignee for other consideration than natural love and affection, when it shall cease at the end of the term at which copyrights expired under the previous acts, unless an extension be agreed between the proprietor and author.

[3] By the interpretation clause, s. 2, of 5 & 6 Vic. c. 45, in the construction of the act, "the word 'book' shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published; that the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing, or otherwise multiplying copies of any subject to which the said word is herein applied; that the words 'personal representatives' shall be construed to mean and include every executor, administrator, and next of kin entitled to administration; that the word 'assigns' shall be construed to mean and include every person in whom the interest of an author shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise."

The defendant published a work, containing an original essay on modern English poetry, biographical sketches of forty-three modern poets, and selections from their poems, amongst which were six short poems

(C) *Assignment of Copyright.*[1]

and parts of longer poems, the copyright whereof belonged to the plaintiff. The selections constituted the bulk of the defendant's work, but were alleged to have been introduced for the purpose of illustrating the essay. A court of equity restrained the publication of the defendant's work, as being an infringement of the plaintiff's copyright. *Campbell v. Scott*, 11 Sim. 31; 6 Jur. 186.

An injunction will be granted against third persons publishing lectures orally delivered, who have procured the means of publishing those lectures from parties who attended the oral delivery of them, and were bound by the implied contract. *Abernethy v. Hutchinson*, 1 H. & T. 38; 3 L. J. Ch. 209. *See* 5 & 6 Wm. 4, c. 65; 6 & 7 Vic. c. 65.

The copyright in magazine articles and contributions to publications, which consist of the writings of various authors, is regulated by the 18th section of the 5 & 6 Vic. c. 45, by which it is enacted, that "when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed, or shall employ any person to compose the same, or any volumes, parts, essays, articles, or portions shall have been, or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only that, in the case of essays, articles, or portions forming part of, and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor, shall not publish any such essay, article, or portion separately or singly without the consent, previously obtained, of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been, or who shall be so employed as aforesaid, to publish any such his composition in a separate form, who, by any contract, express or implied, may have reserved, or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right, shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor, as aforesaid."

It seems that, where the publishers of a magazine employ and pay an editor, and the editor employs and pays persons for writing articles in the magazine, that the copyright in such articles is not vested in the publishers. *Brown v. Cook*, 16 L. J. Ch. 140; 11 Jur. 77. *Sed qu. Sweet v. Benning*, 2 Hill, Torts, *contra*. And it has been held, that actual payment for an article written for a periodical work is a condition precedent to the vesting of the copyright in the proprietor of the work, and that a contract for payment is not sufficient. *Richardson v. Gilbert*, 1 Sim. N. S. 336; 20 L. J. Ch. 553.

The proprietor of an encyclopædia, who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. *Hereford v Griffin*, 16 Sim. 190; 17 L. J. Ch. 210. *See* 1 John. & H. 112; 3 L. T. (N. S.) 466.

[1] The proprietor of the copyright in books, if he wishes to sell and transfer the copyright, must make an entry in the register of the Stationers' Company of such books, the time of the first publication thereof, and the name and place of abode of the publisher and proprietor of the copyright in the form given in the schedule, and every such registered proprietor may assign his interest, or any portion thereof, by making an entry in the register of the assignment, and of the name and place of abode of the assignee, in the form given in the schedule of the act; and the assignment so entered is expressly exempted from stamp-duty, and is of the same force and effect as if it had been made by deed. Ss. 12, 13, 5 & 6 Vic. c. 45; 3 Macq. H. L. C. 611. If the assignment is made abroad, it must be a valid transfer according to the law of the country in which it is made, to constitute the transferee an assign of the author within the meaning of the statute of Victoria. *Cocks v. Purday*, 5 C. B. 860.

Previous to the 5 & 6 Vic. c. 45, it was necessary that an assignment of copyright should be attested by two witnesses. *Cumberland v. Copeland*, 31 L. J. Ex. 19. *Davidson v. Bohn*, 6 C. B. 456; 18 L. J. C. P. 15. *Jefferys v. Boosey*, 4 H. of L. C. 815; 24 L. J. Ex. 81. An executor's purchaser does not acquire the rights of an assignee. 2 Hill on Torts, 202, n. As to the distinction between a license to publish and assignment, 27 L. J. Ch. 254.

(D) *Of the Registration of Copyright.*[1]

(E) *Remedy in case of Infringement of Copyright.*

Action on the case lies against the person who infringes the copyright.

5 & 6 Vic. c. 45, s. 15. "If any person shall, in any part of the British dominions, after the passing of this act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent, in writing, of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed."

(*a*) *In Action for Infringement, Defendant must give Notice of Objections to Title.*[2]

[1] Before suing for infringement the proprietor of the copyright must be registered as such at Stationers' Hall. 5 & 6 Vic. c. 45, s. 24. As to the correctness of description, *see* 33 L. T. 195; 5 Jur. 947.

To entitle any one but the author to register there must be an absolute assignment of the copyright. *Ex-p. Barlow*, 14 C. B. 631.

As to expunging entries improperly made, see *Ex-parte Davidson*, 2 E. & B. 577. *Chappell v. Purday*, 12 Mee. & W. 303; 13 L. J. Ex. 7.

Where the first edition of a work of compilation was published before the 5 & 6 Vic. c. 45, and several editions were published after the act, but were not registered, it was held that, as to so much of the matter contained in the original edition as was contained in the subsequent ones the proprietor of the copyright might sue, although such subsequent editions were not registered; but as to the new matter, the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point. *Murray v. Bogue*, 1 Drew, 353; 22 L. J. Ch. 457. *See* Forms of Pleadings, B. & L. Pr. 177; Claim for Injunction, id. 202.

[2] If the defendant intends to set up as answer to the action objections to the plaintiff's title, he must give notice thereof in writing to the plaintiff, "and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book, in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or is the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice." 5 & 6 Vic. c. 45, s. 16.

The notice of objection is sufficient if it allege a definite publication of the disputed work at some particular place by some definite party, either before or simultaneously with the publication by the plaintiff, or with a publication in another place. *Boosey v. Purday*, 10 Jur. 1038. See *Boosey v. Davidson*, 4 D. & L. 147. *Leader v. Purday*, 7 C. B.; 46 D. & L. 408. *See* Form, B. & L. Pr. 429.

Notwithstanding the use of the expression "against the form of the statute" in a declaration for infringement of copyright, it is open to the plaintiff to show an infringement of a common-law right. *Boosey v. Tothein*, 5 C. B. 476; 5 D. & L. 547.

In *Chappell v. Purday*, 1 D. & L. 458, 12 Mee. & W. 303, the defendant was allowed to plead that the plaintiff was not the proprietor of the copyright at the time of committing the grievance; and also that he was not the proprietor of the copyright when the books were printed.

The registered proprietor of the copyright is deemed the proprietor of pirated copies, and after demand in writing is entitled to sue for and recover the same, or damages for the detention thereof, in an action of *detinue* from any person who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover. 5 & 6 Vic. c. 45, s. 23; 3 Macqueen, H. L. C. 611.

A party who has brought an action for piracy, and the action settled, cannot join a co-proprietor in another action for the offence. *Sweet v. Archbold*, 10 Bing. 133; 3 M. & Scott, 209.

II. In Music[1] and Dramatic Pieces.[2]

III. In Sculpture[3] and Engravings.[4]

Murray v. Heath, 1 B. & Adol. 804.

The 17 Geo. 3, c. 57, and preceding statutes, only apply to engravings printed from other engravings, and not from the original plate.

The declaration stated that the plaintiff was possessed of, and had right to the sole use of divers drawings, his property; that he delivered them into the custody of the defendant Heath, to be by him engraved on copper-plates for the plaintiff's sole use, for reward from the plaintiff to Heath, and to be returned with such copper-plates so engraved, and that he retained Heath in that behalf, and Heath accepted the drawings, and took the same for the purpose aforesaid, and under the said retainer engraved the same on copper-plates for the plaintiff, and the plaintiff paid him the said reward; and charged that the then defendants, whilst the said drawings and copper-plates remained in Heath's custody, worked and took off for their use divers impressions on paper from the said plates, without the plaintiff's consent.

Per Cur. There might be some difficulty, if the case were to be considered upon the terms of the 17 Geo. 3 alone. But the preamble to that act recites the previous acts of the 8 Geo. 2, c. 13, and the 1 Geo. 3, c. 38; and from these it is quite clear that the mischief against which the legislature meant to provide was the making engravings from new plates or designs. For any such act the party injured has his remedy by action on the case, and is entitled under the statute to double costs. Looking at the 8 Geo. 2, the recital and the different provisions, this is perfectly clear. The present case was never thought of, and

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[1] A publication of a piece of music not for sale or hire, but by the gratuitous distribution of lithographed copies amongst the members of a musical society, is a publication for which the person so publishing is liable as for an invasion of the property of the proprietor therein, independently of the 15th section of the statute. *Novello v. Ludlow*, 12 C. B. 177.

A person who writes words to an old air, and procures an accompaniment, and publishes them together, is entitled to copyright in the whole work, and may describe his title accordingly in a declaration. *Leader v. Purday*, 7 C. B. 4; 18 L. J. C. P. 97.

[2] As to copyright in dramatic pieces, *see* 5 & 6 Vic. c. 45, ss. 20–22; 3 & 4 Wm. 4, c. 15.

To constitute a person an offender, he must, by himself or agent, actually take part in the representation which is a violation of the copyright. Therefore, one who merely lets a room to the offender is not liable, even though he supplies the benches and light, or sells a ticket of admission, deriving no other profit than that arising from the letting of the room. *Russell v. Briant*, 8 C. B. 836; 19 L. J. C. P. 33.

Representing the incidents of a published novel in a dramatic form upon the stage, although done publicly and for profit, is not an infringement of the copyright in the novel. *Reade v. Conquest*, 30 L. J. C. P. 209. See *Coleman v. Wathers*, 5 T. R. 245. *Murray v. Ellerton*, 5 B. & A. 657. *See* 29 L. J. C. P. 20.

[3] As to copyright in sculpture, *see* 38 Geo. 3, c. 59. *Gahagan v. Cooper*, 3 Camp. 111. *West v. Francis*, 5 B. & A. 737; 1 D. & R. 400. *See* 5 & 6 Vic. c. 100; 6 & 7 id. c. 65; 13 & 14 id. c. 104; 21 & 22 id. c. 70.

[4] Engravings must contain the date of publication and name of publisher to sustain an action for piracy. *Newton v. Cowie*, 4 Bing. 234; 12 Moore, 457.

The action given by the 17 Geo. 3, c. 57, to the person entitled to copyright in engravings against any person who shall sell piratical copies, is maintainable notwithstanding the seller was ignorant of the existence of a copyright. *Gambart v. Sumner*, 5 H. & N. 5; 29 L. J. Ex. 98.

The defendant may plead that the plaintiff was not entitled to the sole right, &c., because the date was not marked on the engraving. *Brookes v. Cock*, 4 Nev. & M. 652; 3 Ad. & E. 138. But under the plea of non-assumpsit, the defendant cannot show that the assignment was not in writing. *Barnett v. Glossop*, 1 Bing. N. S. 633; 1 Scott, 622.

It is a singular anomaly in our law that the author of a picture has, it seems, no copyright in his production, although it may be the fruit of great study and skill: in this respect, the rights of a great historical painter are inferior to the inventor of a new fashion of door-handle. When the picture is engraved, the engraving is protected; but the picture from which the engraving is made is not. Endeavours have been made to remedy this defect. Last session of parliament a bill was introduced in the House of Commons with this view, but it was not carried.

In a recent case (*Turner v. Robinson*, 10 Irish Ch. R. 121) it was held, that before publication of a picture, the proprietor of it, whether the painter or the purchaser of the picture, has a right to prevent any one making a copy of it. *See* also *Prince Albert v. Strange*, 1 M'N. & G. 25; 18 L. J. Ch. 120.

no act of parliament was necessary to provide a remedy, for the act done by the defendant Heath was a fraud at common law.

IV. In Designs.

(A) *Nature and Term of Copyright.*

The copyright in a new design applied to an article of manufacture, is vested in the proprietor for a limited period.

5 & 6 Vic. c. 100, s. 3, provides, "with regard to any new and original design (except for sculpture and other things within the provisions of the several acts mentioned in the schedule C to this act annexed), whether such design be applicable to the ornamenting any article of manufacture, or of any substance, artificial or natural, or partly artificial and partly natural; and that whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined, be it enacted, that the proprietor of every such design not previously published, either within the United Kingdom of Great Britain and Ireland, or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substance as aforesaid, provided the same be done within the United Kingdom of Great Britain and Ireland for the respective terms hereinafter mentioned, such respective terms to be computed from the time of such design being registered according to this act."[1] *See* 24 & 25 Vic. c. 75.

[1] The following is the classification and the respective periods of copyright:—

In respect of the application of any such design to ornamenting any article of manufacture contained in the 1st, 2d, 3d, 4th, 5th, 6th, 8th, or 11th of the classes following, for the term of three years.

In respect of the application of any such design to ornamenting any article of manufacture contained in the 7th, 9th, or 10th of the classes following, for the term of nine calendar months (extended as required, in class 10, to three years by 21 & 22 Vic. c. 70).

In respect of the application of any such design to ornamenting any article of manufacture or substance contained in the 12th or 13th of the classes following, for the term of twelve calendar months:

Class 1. Articles of manufacture composed wholly or chiefly of any metal or mixed metal.

Class 2. Articles of manufacture composed wholly or chiefly of wood.

Class 3. Articles of manufacture composed wholly or chiefly of glass.

Class 4. Articles of manufacture composed wholly or chiefly of earthenware.

Class 5. Paper-hangings.

Class 6. Carpets (floor-cloths and oil-cloths, 6 & 7 Vic. 65, s. 5).

Class 7. Shawls of the design, &c., applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics.

Class 8. Shawls not comprised in class 7.

Class 9. Yarn, thread, or warp, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced.

Class 10. Woven fabrics composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics, excepting the articles included in class 11.

Class 11. Woven fabrics composed of linen, cotton, wool, silk, or hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics, such woven fabrics being or coming within the description technically called furniture, and the repeat of the design whereof shall be more than twelve inches by eight inches.

Class 12. Woven fabrics not comprised in any preceding class.

Class 13. Lace, and any article of manufacture or substance not comprised in any preceding class.

The subject of registration under 5 & 6 Vic. c. 100, must be a design and not an article of manufacture, and though old elements in a new combination may form the subject of registration they must, when combined, form "a new and original design," and not be the component parts of an article of manufacture. *Norton v. Nicholls*, 28 L. J. Q. B. 225.

The design of a "protector label," which consisted in making in the label an eyelet hole, and lining it with a ring of metallic substance, through which a string attaching the label to packages passed, is not within the protection of 6 & 7 Vic. c. 65, s. 2. *Margetson v. Wright*, 2 De Gex & Sm. 420.

A newly-invented brick, the utility of

(B) *Provided the Design be Registered, and the fact of Registration appear on each Article.*

Provided the design be registered, and the fact of registration appear on each article.

5 & 6 Vic. c. 100, s. 4. "Provided always and be it enacted, that no person shall be entitled to the benefit of the act with regard to any design in regard to the application thereof to the ornamenting any article of manufacture, or any such substance, unless such design have before publication thereof been registered according to this act,[1] and unless at the time of such registration such design have been registered in respect of the application thereof to some or one of the articles of manufacture or substances comprised in the abovementioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered according to this act as a proprietor of such design, and unless after publication of such design every such article of manufacture, or such substance to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for printing at one end thereof, or if of any other kind or such substance as aforesaid, at the end or edge thereof, or other convenient place thereon, the letters 'R^d.,' together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration of such design, according to the registry of designs in that behalf,[2] and such marks may be put on such article of manufacture or such substance, either by making the same in or on the material itself of which such article or such substance shall consist, or by attaching thereto a label containing such marks."

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which consisted in its being so shaped that when several bricks were laid together in building a series of apertures were left in the wall, through which the air might circulate, and a saving in the number of bricks effected:—It was held that it was a design which might form the subject of registration. *Rogers v. Driver*, 20 L. J. Q. B. 31.

Where the design was of a new ventilator, consisting of an oblong pane of glass fixed in a frame, which was inserted into an ordinary window-frame, and was hinged at the top, so as to open and admit the air, by means of a screw acted upon by cords passing over its head, and having a half pane of glass fixed in the lower portion of the frame in which the ventilating frame ended, so as to prevent a downward draught. The claim of the inventor was said to be for the general configuration and combination of the parts, some of which, if taken *per se* and apart from the purposes thereof, were now original. This was held not to be a design for the shape and configuration of an article of manufacture within the 6 & 7 Vic. c. 65, and therefore not the subject of registration; and a conviction for the infringement of such a registered design was quashed for want of jurisdiction. *Reg. v. Bessell*, 20 L. J. M. C. 177.

Designs for sewed muslin collars, transferred to the muslin by printing or stamping with lithographic ink or other colour, and which so printed or stamped with the pattern are worked by a needle on muslin, and present, when finished, the appearance of ornamental sewing only, are properly registered under class 10 of the Designs Copyright Act, 5 & 6 Vic. c. 100, s. 3. *Rogers v. Browne*, 12 Ir. L. R. 293.

The publication of a book of designs by the owner of the copyright does not give any right to the purchaser of such book to apply the designs to articles for the purpose of sale without the permission of the proprietor, nor need the copies of a newly-registered design, published in a book for sale, have any registration mark attached to it. *Riego de la Branchardière v. Elvery*, 4 Ex. 380; 18 L. J. Ex. 381.

A new combination of old patterns may be a new and original design, so as to be a proper subject of registration under the 5 & 6 Vic. c. 100. 4 H. & N. 815.

Where a design was registered for ornamenting woven fabrics, which design was applied to a fabric woven in cells called the honeycomb pattern, and consisted of a combination of the large and small honeycomb, so as to form a large honeycomb stripe on a small honeycomb ground; neither the large nor small honeycomb was new; they had never before been used in combination, but the fabrics had been used with a similar combination of a large and small pattern. This was held not to be a new design. *Harrison v. Taylor*, 3 H. & N. 301.

[1] *See* s. 17, and *see* 21 & 22 Vic. c. 70, s. 5, by which the registration of any portion or pattern of an article of manufacture to which a design is applied may be adopted in lieu of a copy, drawing, print, specification, or description in writing. See *Norton v. Nicholls*, 28 L. J. Q. B. 225.

[2] It is necessary, in order to enjoy the protection of the statute, that every article should bear the letters "R^d.," and a number or letter to correspond with the date of registration. 5 & 6 Vic. c. 100, s. 4. *Heywood v. Piller*, 1 E. & B. 499.

The falsely using a mark to indicate that an article is registered which is not so, subjects the offender to a penalty of 10*l.* 21 & 22 Vic. c. 70, s. 7.

(C) *Remedies in case of Infringement.*

And piracy of such registered design is prohibited by statute under a penalty.[1]

5 & 6 Vic. c. 100, s. 7, enacts, for preventing the piracy of registered designs, "that during the period of any such right to the entire or partial use of any such design, no person shall either do or cause to be done any of the following acts, with regard to any articles of manufacture or substances, in respect of which the copyright of such design shall be in force, without the license or consent in writing[2] of the registered proprietor thereof; (that is to say), no person shall apply any such design, or any fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article of manufacture, or any substance, artificial or natural, or partly artificial or partly natural.

"No person shall publish, sell, or expose for sale any article of manufacture, or any substance to which such design, or any fraudulent imitation thereof, shall have been so applied, after having received, either verbally or in writing, or otherwise, from any source other than the proprietor of such design, knowledge that his consent has not been given to such application, or after having been served with, or had left at his premises, a written notice, signed by such proprietor or his agent, to the same effect."

(D) *Where Design has Reference to an Article of Utility.*

The designer of a new design having reference to an article of utility, may, so far as the design is for its "shape or configuration," by registration acquire a copyright for three years therein.[3]

6 & 7 Vic. c. 65, s. 2, enacts, "with regard to any new and original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that, whether it be for the whole of such shape or configuration, or only for a part thereof, that the proprietor of such design, not previously published within Great Britain and Ireland, or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design, for the term of three years, to be computed from the time of such design being registered, according to this act: Provided always, that this design shall not extend to such designs as are within the 5 & 6 Vic. c. 100, 38 Geo. 3, c. 71, or the 54 Geo. 3, c. 56."

Sect. 3 provides that "no person shall be entitled to the benefit of this act unless the design have, before publication thereof, been registered according to this act, and unless the name of such person shall be registered according to this act as a proprietor of such design, and unless, after publication of such design, every article of manufacture made by him according to such design, or on which such design is used, hath thereon the word 'Registered,' with the date of registration."

(E) *Provisional Registration.*

As to provisional registration, *see* 13 & 14 Vic. c. 134.

V. International Copyright. *See* 1 & 2 Vic. c. 59; with France, 15 & 16 Vic. c. 12.

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[1] The publication of a book of designs by the owner of a copyright therein is not a license to the purchaser of the book to apply the designs to articles of manufacture for the purpose of sale. *Riego de la Branchardière v. Elvery*, 18 L. J. Ex. 381.

[2] In case of any such act of infringement the offender is liable to forfeit a penalty of not less than 5*l.*, and not exceeding 30*l.*, to the proprietor of the design, who may recover the same either by action on the case or by a summary proceeding before justices. 5 & 6 Vic. c. 100, s. 8.

The action for damages for infringement may be brought in the County Court. 21 & 22 Vic. c. 70, s. 8.

It is not a sufficient notice under s. 7 to inform the defendant, a retail dealer, that the plaintiff is proprietor of the design, and that if he sells any article to which the design is applied the plaintiff will take proceedings against him; but the notice ought to state explicitly that the plaintiff has not given his consent to the application of the design. *Norton v. Nicholls*, 28 L. J. Q. B. 225.

[3] A penalty of 5*l.* is incurred by wrongfully using marks falsely to indicate registration. 6 & 7 Vic. c. 69, s. 4.

The statute does not apply to designs which have reference to a purpose of utility through the combination of parts, independently of their shape and configuration. *Reg. v. Bessell*, 16 Q. B. 810; 20 L. J. M. C. 177. *Bessell v. Wilson*, 1 E. & B. 489.

CORAM Nobis.[1]

CORAM non Judice.[2]

CORAM Vobis.[3]

CORN. *See* Crops; Stacks.

(A) *Contract for Sale of by Illegal Measure void.*[4]

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[1] *Before us.* The name given to writs of error on judgments of the Court of King's (or Queen's) Bench, so called from that clause in the old forms which described the record and process as remaining "before us."

[2] Where an action is brought in a court whereof the judges have not any jurisdiction, it is said to be *coram non judice*. Cro. Eliz. 530; Cro. Jac. 531; Termes de la Ley. Broom's *Max.* 69. It is also sometimes applied to proceedings even in a court having jurisdiction where they become void by irregularity. W. Jon. 170. "*Sententia a non judice lata nemini debet nocere*,"—A sentence passed by one who is not a judge ought to harm no one. *Fleta*, lib. vi. c. 6, 57.

[3] A name given to writs of error on judgments of other courts than the King's (or Queen's) Bench, especially the Court of Common Pleas. See *Coram nobis, supra*. A writ of this kind lies to the Common Pleas to correct its own judgments as for errors in fact. 2 Tidd's Prac. 1137, 1142, 1143.

[4] An agreement to sell by the Winchester bushel is void. *Walls v. Friend*, 10 B. & C. 446. A sale by the *hobbett* is also illegal. *Tyson v. Thomas*, M'Clel. & Y. 119. *See post*, Weights and Measures. 5 & 6 Wm. 4, c. 63; 22 & 23 Vic. c. 56. As to Corn-Rents, *see* 1 Platt, 283.

[5] A custom of the Liverpool corn-market, that where corn is sold by sample, if the buyer does not on the day the corn is sold examine the bulk and reject, he cannot afterwards reject it, or refuse to pay the whole price, has been held to be reasonable. *Sanders v. Jameson*, 2 C. & Kir. 557.

[6] A caption of seisin to the use of the first Duke of Cornwall, by persons appointed by letters patent for that purpose, being a public act, is evidence as to the rights of the duchy. *Rowe v. Brenton*, 8 B. & C. 743.

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(A) *Of the County.*[1]
(B) „ *Verge.*[2]
(C) „ *Admiralty.*[3]
(D) *In Boroughs.*[4]

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[1] The 3 Edw. 1, c. 10, enacts, "that in all shires a sufficient number of men shall be chosen to act as coroners." No precise number, however, is required. In some counties there are six, in some four, and in others only one or two. *See* 2 Inst. 175; F. N. B. 163. In Middlesex there are two; and by the 34 & 35 Hen. 8, c. 26, in each county in Wales and Chester there shall be two. *See* also 1 Hale, P. C. 56.

By the 3 Hen. 8, c. 12, all inquisition upon view of persons slain in any places or houses of the king, shall be taken by coroner of the household without the assistance of any coroner of any shire, by twelve or more of the yeomen, officers of the king's household, returned by two clerks, comptrollers, the clerks of the cheque, and clerks marshal, or one of them, on the coroner's precept to them. *See* 4 Co. 46, b. But if the same person be coroner of the verge, and also of the county at large, an inquest taken before him shall be good. Id. 47, a.

[3] Coroners of the Admiralty are those who take inquests of deaths arising upon the high seas (2 Hale, P. C. 54); and concurrently with the coroners of the county where death happens on shores that are arms of the sea. Id. 16; Jer. Cor. 47; 3 Q. B. 330; 5 id. 944. *See* 9 Geo. 4, c. 31; and *post*, 258.

[4] By 5 & 6 Wm. 4, c. 76, s. 62, it is enacted, "that in every borough having a separate court of quarter sessions, the council are to appoint a fit person, not being an alderman or councillor, to be coroner of such borough, so long as he shall well behave himself in his office;" and they shall fill up every vacancy within ten days after it occurs.

II. Relative to the Qualifications of Coroner.[1]

III. Relative to the Appointment of, Election of, Swearing of, and Duration of Coroner in Office.

(A) *As to the Appointment.*

(*a*) *By Virtue of Office.*[2]

(*b*) *By Charter.*[3]

(*c*) *By Election.*[4]

(B) *As to the Swearing of.*[5]

(C) „ *Duration of in Office.*[6]

IV. Relative to the Duty of the County.[7]

V. „ Duty and Authority of the Coroner.

(A) *To act within his Jurisdiction.*

The coroner of the place where the body is lying dead has jurisdiction, notwithstanding the death may have been occasioned elsewhere.[8]

6 & 7 Vic. c. 12, after reciting that "it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened, enacts, "that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead, shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner: and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy-coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land."

[1] Formerly no person was eligible to the appointment of coroner under the degree of a knight. *See* 3 Edw. 1, c. 10; 4 Inst. 271. And by the 14 Edw. 3, c. 8, s. 1, no coroner shall be chosen, unless he has land in fee sufficient to answer to all manner of people, and be of sufficient ability and knowledge to do his office. *See* 2 Inst. 176. And where a common merchant was chosen a coroner, he was removed on the ground he was *communis mercator* (*see* 2 Inst. 32); but his being *minus idoneus* is no ground for his discharge. It is said that a qualification of estate is not necessary, that the acts were passed as exempted only from serving the office. *Stafford's case*, cited Jer. 9.

[2] The Chief Justice of the Queen's Bench is, by virtue of his office, principal coroner of England. *See* 4 Co. Rep. 57. The other judges of that court are sovereign coroners. *See* 4 Inst. 173. Jer. Cor. 3.

[3] The Lord Mayor of London is, by charter, 18 Edw. 4, coroner of London. The Bishop of Ely also has power by charter, Hen. 7, to make coroners; and there are coroners of particular lords of franchises and liberties, who by charter have authority to create their own coroners, or to be coroners themselves, especially in the jurisdiction of the Admiralty, as well as that of the verge. *See* 1 Hale, P. C. 52; 4 Rep. 57; 1 Com. 384.

[4] The coroner of the county is chosen by virtue of the Queen's writ, *De coronatore eligendo*, directed to the sheriff, commanding him in full county, and with the assent of the same, to elect a person coroner who best knows and can attend to the duties of the office. *See* Stat. of West. 1, c. 10; 28 Edw. 3, c. 6. No person but freeholders have a right to vote at such elections. *See* 2 Hawk. P. C. c. 9, ss. 5, 10; and 58 Geo. 3, c. 95.

The mode of electing coroners is now regulated by the 7 & 8 Vic. c. 92, and the 23 & 24 Vic. c. 116. The polling is to continue for one day only. Id. 72. As to division of counties *see* 7 & 8 Vic.

[5] Immediately after the coroner has been elected he is to be sworn before the sheriff to the due execution of his office. *See* 2 Hale, P. C. 55.

[6] The coroner's appointment does not determine by the death of the king (*Anon.* 3 Salk. 100), he being chosen for life; but he may be removed either by being made sheriff or chosen verderor, which are offices incompatible with the other; or by the king's writ. *De coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, has not a sufficient estate in the county, or lives in an inconvenient part of it. *See* F. N. B. 163, 164; 1 Bl. Com. 348. And by the 25 Geo. 2, extortion, neglect, or misbehaviour, are also made causes of removal. And now the Lord Chancellor may, if he think fit, remove a coroner for inability or misbehaviour in his office. 23 & 24 Vic. c. 116, s. 6.

[7] Whenever an unnatural death happens, it is the duty of the township to give notice to the coroner, otherwise, if the body be interred in his absence, the township shall be amerced. Hale, P. C. 170. It is indictable to bury a man who dies a violent death before inquest. *Anon.* 7 Mod. 10.

[8] By s. 2, 7 & 8 Vic. c. 92, "for the purpose

(B) *To take Inquests.*

(*a*) *In General.*[1]

May be ruled to hold an inquest if he neglect or refuse to do so.

By the 23 & 24 Vic. c. 116, "if any coroner shall refuse or neglect to hold an inquest in any case in which such inquest ought to be held, it shall be lawful for her Majesty's attorney-general to apply to the court of Queen's Bench, or, during vacation, to a judge of any one of her Majesty's superior courts of law at Westminster, for a rule calling on such coroner to show cause why he should not hold such inquest; and if, after due service of such rule, good cause should not be shown against it, it shall be lawful for the judge to make such rule absolute, with or without payment of costs, as to such judge shall seem meet; and the coroner upon being served with such rule absolute shall obey the same, and hold such inquest, upon pain of being liable to an attachment in case of refusal or neglect."

(*c*) *By whom to be taken where there are several Coroners.*[2]

(*d*) *Within what Time to be taken.*[3]

(*e*) *To Summon the Jury.*[4]

(*f*) *To View the Body.*[5]

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of holding inquests, every detatched part of a county, riding, or division shall be deemed to be within that county, riding, or division, by which it is wholly surrounded, or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary."

And by s. 3, "if a verdict of murder or manslaughter, or as accessory before the fact to any murder, shall be found by the jury at any such inquest against any person or persons, the coroner holding the said inquest, and the justices of oyer and terminer and gaol delivery for the county, city, district, or place in which such inquest shall be holden, and all other persons, shall have the same powers respectively for the commitment, trial, and execution of the sentence of the person or persons so charged as they now by law possess with regard to the commitment, trial, and execution of the sentence upon any person or persons committed and tried within the jurisdiction where the death happened.

At common law, if any felonies or treasons were committed within any creek or arm of the sea, which was in the body of a county, the common-law courts only had jurisdiction, and the admiral or maritime court none; but by 15 Rich. 2, c. 3, on the death of man or maihem in great ships, hovering in the main stream of great rivers, below the bridges near to the sea, the admiral shall have jurisdiction. But this clause does not exclude the county coroner, who has herein a concurrent jurisdiction with the admiralty coroner, who may take inquisitions *super visum corporis*, upon such deaths happening in great rivers, which are arms of the sea, that flow and reflow beneath the first bridge, within the bodies of counties, and bear great ships, where a man may see from side to side. Jer. Cor. 48.

Where a person was found drowned in a river within the concurrent jurisdiction (exclusive of all others) of the coroner of the city and the admiralty, and the body was taken to a place on the shore beyond the city limits, it was held that the coroner and jury of the city could not view the body at such a place for the purpose of an inquest, and an inquisition taken on such view was quashed. *R. v. Hinde*, 5 Q. B. 944. *See* also *R. v. Ellis*, 2 C. & Kir. 470.

[1] A coroner has no authority to hold an inquisition to inquire into the cause of a fire. *Reg. v. Herford*, 29 L. J. Q. B. 249; 8 W. R. 579. But he may admit persons accused of manslaughter to bail. 22 Vic. c. 33.

[2] Where there are several coroners in the county, and they act judicially, as by taking an inquest, the act of one is sufficient; but where they act ministerially, they must all join. And it is said in the former case that, after such proceeding by any one of them, an inquest by another would be void. *See* 2 Hale, P. C. 59; Staundf. P. C. 53.

[3] The inquest must be holden within a reasonable time after the death; hence seven months are too late. *Rex v. Bond*, 1 Stra. 22. *See* Jer. Cor. 28.

[4] By the 4 Edw. 1, the coroner is directed to summon his jury out of the four, five, or six of the next adjacent towns, and it was anciently so expressed in the inquisition; but this rule has not always prevailed, or any precise number of vills been required, nor is it now necessary, or can the want of it be objected to, provided they be summoned from the neighbourhood. *See* 1 Sid. 204; 1 Keb. 723. The 8th Hen. 6, c. 19, enacts, that the inquiry shall be made by persons having lands of the yearly value of 40*s.*, and to be summoned by the sheriff; but it is not usual in practice to return a jury with such qualifications.

[5] The view on a coroner's inquest must be by the jury and coroner at the same time; and if the body cannot be viewed, the coroner can do nothing, but the inquest must be before the justices of the peace.

(*g*) *To Summon and Examine Witnesses, and receive Evidence; and of the Witnesses' Expenses.*[1]

(*h*) *To Adjourn the Inquest.*[2]

(*i*) *As to the Form of the Inquisition.*[3]

Rex v. Farrant, 1 Chit. Rep. 745; 3 B. & A. 260. It seems the whole of the body must be inspected. *Rex v. Bond*, 1 Stra. 22.

[1] It is the duty of the coroner to summon witnesses (1 Chit. Crim. L. 164); and on the appearance of each witness the coroner is to take down his name, abode, and occupation, and then administer the oath that he shall speak the truth, &c. *See* Umfr. on Coroner, 177; Jer. Cor. 231.

And by 6 & 7 Wm. 4, c. 89, s. 1, as to medical witnesses, the coroner may issue an order for the attendance of any legally qualified medical practitioner, who attended the deceased in his last illness, or, if he were not so attended, of any legally qualified medical practitioner in or near the place of the death; and the coroner may direct a *post-mortem* examination of the body, with or without an analysis of the contents of the stomach or intestines. (By s. 2.) So, the coroner may order the attendance of other legally qualified medical practitioners, if a majority of the jury require it. (By s. 3.) And where any such order shall be personally served upon such practitioner, or shall have been received by him in sufficient time for him to have obeyed it, or shall have been served at his residence, if he do not obey such order he shall forfeit 5*l.* upon complaint thereof, made by the coroner or any two of the jury, before any two justices having jurisdiction in the parish or place where the inquest was held, or where such medical practitioner resides; and such two justices are hereby required, upon such complaint, to proceed to the hearing and adjudication of such complaint, and (if such medical practitioner shall not show to the said justices a good and sufficient cause for not having obeyed such order) to enforce the said penalty by distress and sale of the offender's goods, as they are empowered to proceed by any act of parliament for any other penalty or forfeiture. Id. s. 6.

By 1 & 2 Vic. c. 68, s. 2, it is enacted, "that so much of the said act passed in the then last session of parliament as directs the coroner to make an order on the churchwardens and overseers of the parish in which any death shall have happened for payment of the remuneration or fee payable under the provisions of that act to any medical practitioner, and as directs such churchwardens and overseers to pay the same out of the funds collected for the relief of the poor of such parish, shall be and the same is hereby repealed, and in lieu thereof the coroner shall, immediately after the termination of the proceedings at any inquest, advance and pay such remuneration or fee to every medical witness summoned under the provisions of the said act, and the amount thereof shall be repaid to the said coroner in manner (in the statute) mentioned."

Before the statute, a judge would not allow a fee to a surgeon for attending at an inquest. *Rex v. Taylor*, 5 C. & P. 301. It is the duty of the coroner to bind over those witnesses only who make out the case against the party charged, and not those called by him to rebut it. *Reg. v. Taylor*, 9 C. & P. 672. The deposition of a witness before a coroner, and at the time of the trial of an action arising out of the same action beyond seas, held admissible. *Sills v. Brown*, 9 C. & P. 601.

On the inquest, the coroner ought not to exclude the evidence of parties who are able to state material facts, on the ground that their testimony may lead to criminate themselves; but they may and ought to be told that they are not bound to answer questions which may have that tendency. *Wakley v. Cooke*, 4 Ex. 511; 19 L. J. Ex. 91.

A writ of *habeas corpus* to bring up a prisoner who has been committed for trial on a charge of murder, in order that he may be examined before the coroner's jury on an inquest on the body of the person supposed to have been murdered, unless a case of strong necessity be established. The court of Queen's Bench refused the writ where the ground suggested was that the accused might be identified before the coroner, and it was not shown that other means of identification were not available. *Ex-parte Wakley*, 7 Q. B. 653; 14 L. J. Q. B. 383.

It is the duty of the coroner to read over to each witness the evidence he has given, and to desire him to sign the deposition. *R. v. Plummer*, 1 C. & Kir. 600.

[2] If any of the witnesses be absent, or affected by undue influence, or unwilling to attend, the coroner may adjourn the inquest to another day, at the same place or to another place, informing the jury the hour they are to attend to take and receive the evidence of all those who have not attended, first taking security from the jurors for their appearance at the adjourned time and place. After such adjournment the coroner may grant his warrant to bury the body. *See* Umfr. on Coroner, 179.

[3] The inquisition must state the place of the death, finding of the body, and names of the jury. *Rex v. Evett*, 6 B. & C. 247.

A coroner's inquisition for manslaughter stated the inquest to have been held on the 5th of January, in the 7 Wm. 4, and in the year 1837, and stated that J. M., of &c., on the 28th of December, in the year aforesaid, made an assault, &c.:—*Held* bad, as the offence was charged to have been committed on an impossible day. *Rex v. Mitchell*, 7. C. & P. 800. But if several jurors on a

(*j*) *To take Recognisances.*[1]

(*k*) *To issue Warrants for Apprehension and Commit to Prison.*[2]

(*l*) *To execute Process.*[3]

VI. Relative to the Rights of Coroner.

(A) *To Fees.*[4]

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coroner's inquest have the same Christian and surname, it is not necessary in the caption of the inquisition to distinguish them by abode or addition. An inquisition for manslaughter, which charges that the principals in the second degree were "feloniously present, then and there, abetting, aiding and assisting," is bad, as the word "feloniously" only extends to the "word present," the concluding averment, "and so the jurors do say," does not require either time or place to be stated in it. *Rex v. Nicholas*, 7 id. 538. But a juror need not sign his Christian name at length if recited in the inquisition. *Rex v. Bennett*, 6 id. 179. An inquest in case of manslaughter without the examination of a surgeon cannot be supported. *Rex v. Quinch*, 4 id. 571. A coroner's jury had found that the death of A. was occasioned by means of a locomotive engine of B. being driven against him, and that the same did "feloniously cast to the ground the said A.:" —*Held*, not a sufficient description of the cause of the death of A. *Reg. v. Stockdale*, 8 Dowl. P. C. 517. Some of the jurors being marksmen, and their marks not being attested, the inquisition was held bad on that ground also. Id.

A coroner's inquisition stated in substance that J. D., on the 27th of May, struck M. R. with a poker on the head, and with his hands on the breast, and gave her divers mortal bruises and contusions; and that M. F., on the 23d of June, kicked the said M. R. on the belly, and thereby gave her one mortal bruise and contusion. It then averred that the said M. R., of the mortal bruises, &c. given by J. D., languished from the 27th of May until the 1st of July, and of the mortal bruise, &c. given by M. F., languished from the 23d of June till the 1st of July, and then died of the mortal bruises, &c., contusions on the head and breast, together with the mortal bruise and contusion on the belly. The conclusion was, that the said J. D. and the said M. F., her, the said M. R., in manner and by the means aforesaid, feloniously did kill and slay:—*Held*, bad. *Reg. v. Devett*, 8 id. 639.

And as to the time of the death, the word "instantly" is not equivalent to "then and there." *Reg. v. Brownlow*, 8 Dowl. P. C. 157; 3 Per. & D. 52.

[1] If the verdict be of that description that future proceedings will be necessary, the coroner is to bind over all proper persons to prosecute and give evidence. *See* Umfr. on Coroner, 188.

By 7 Geo. 4, c. 64, s. 4, every coroner, "upon any inquisition taken before him, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material; and shall have authority to bind by recognisance all such persons as know or declare anything touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence, and all such recognisances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court, otherwise the court may fine him." Id. s. 5.

[2] By 5 & 6 Wm. 4, c. 38, s. 3, if the finding of the inquest be for murder or manslaughter, if they do not name any particular person, nothing further can be done by the coroner; but if they name any person as the offender, the coroner may commit him, if he be present, to the common gaol, or to any house of correction near to where the assizes, &c., are to be holden; if absent, he may grant a warrant to apprehend him.

[3] Where coroners act ministerially, they must act jointly, as when they have to summon jurors or execute process. *Rex v. Dolby*, cited Umfr. on Coroners, 144.

[4] The payment of county coroners by fees, mileage, and allowances, was abolished by the 23 & 24 Vic. c. 96, s. 3, and salary, to be agreed on between the coroner and the justices in general or quarter sessions, substituted. This salary is payable out of the county rate. Sect. 4.

In boroughs in which a separate court of quarter sessions shall be holden, the coroner of such borough, for every inquisition which he shall duly take within such borough, shall be entitled to have the sum of 20*s.*, and also the sum of 9*d.* for every mile exceeding two miles he shall be compelled to travel from his usual place of abode to take such inquisition, to be paid by the treasurer of the borough out of the borough fund, by order of the court of quarter sessions of such borough. 5 & 6 Wm. 4, c. 76, s. 62. *See* 1 Vic. c. 68, s. 3.

A coroner is not entitled to any remuneration for holding an inquest, unless in the judgment of the court of quarter sessions it was proper that such inquest should have been held. The court of Queen's Bench will not review the decision of the court of

(B) *To Appoint a Deputy.*[1]

(C) *Privilege from Arrest.*[2]

VII. Relative to the Liabilities of the Coroner.[3]

VIII. Relative to the Verdict.[4]

IX. Relative to the Publication of Proceedings before Coroner,[5] and of a Stranger's Right to attend the Inquest.[6]

X. Quashing Inquisitions.[7]

quarter sessions upon this matter. The session have, however, no power to disallow disbursements which the coroner is compelled by the 7 Wm. 4, and 1 Vic. c. 68, to make: such as the fees to medical men, payments to jurors, for hire of room, &c. *Reg. v. Justices of Carmarthenshire*, 10 Q. B. 796; 10 L. J. Q. B. 167.

If two inquests be held at the same time on the same day, the coroner is not entitled to travelling expenses in each case. *Rex v. Justices of Warwick*, 5 B. & C. 430; 8 D. & R. 147.

[1] It seems a coroner may appoint a deputy. *Ex-parte Carruthers*, 2 M. & R. 397. In a prior case it was held that a coroner cannot appoint a deputy. *Rex v. Tarrant*, 1 Chit. Rep. 740; 3 B. & A. 269. But now by 6 & 7 Wm. 4, c. 105, s. 6, a coroner, in case of illness or unavoidable absence, is authorised to do so. But an inquisition taken before a coroner's clerk, and not the coroner, cannot be removed by *certiorari*. *Ex-parte Dawes*, 1 Per. & D. 146; 8 Ad. & E. 936.

[2] The court ordered the discharge of a coroner arrested under civil process while going to procure papers necessary for an inquest to be held the same day (*Ex-parte Deputy-Coroner of Middlesex*, 6 H. & N. 501); and in Ireland, where a sheriff arrested a coroner, with notice that he was at the time engaged in discharging the duties of his office, the court on motion discharged the coroner, with costs against the sheriff. *Galaghan v. Twiss*, 9 Ir. L. R. 422.

[3] 1st, *for Misconduct.*—An attachment. *Andrews v. Sharp*, 2 Black. 911. *Rex v. Peckham*, id. 1218); or an information lies against a coroner for misconduct (*Rex v. Scory*, 1 Leach, C. L. 43); as where he told the jury that a verdict of *felo de se* and lunacy were the same. *Rex v. Wakefield*, 1 Stra. 69.

2nd, *for Acts of Co-coroner.*—One coroner is liable for the acts of his co-coroner (*Naylor v. Sharply*, 1 Mod. 198; 2 id. 23; Freem. 191), when they act ministerially (*see* Staundf. P. C. 53, a.; 2 Hale, P. C. 58); but not when he acts judicially, as, in the taking an inquisition of death. *See* 2 Hale, P. C. 59.

And 3rdly, *to be Removed.*—A coroner will be discharged from his office for using corrupt influence over the jury. *Rex v. Coates*, cited Dick. 515. And by 25 Geo. 2, c. 29, he is removable from his office for extortion, or for any wilful neglect of duty, or misbehaviour. And a new one is to be chosen in his room. 5 Co. 58, b. And, in *Ex-parte Parnell*, (1 J. & W. 451), confinement in prison for twelve months was holden a good ground for removing him, though his duties had been performed by another coroner in his absence. The practice is to issue both the writ *De coronatore exonerando*, and that *De coronatore eligendo*, at the same time, though the former must be first executed, and no notice of the issuing need be given to the party removed. He may have a commission to inquire whether the cause assigned for removal be true, but he cannot traverse it. *See* id. 454. *See* power of Chancellor to remove, 23 & 24 Vic. c. 116, s. 6.

[4] By 4 Geo. 4, c. 52, s. 1, "if the inquest find the deceased *felo de se*, that is, that he voluntarily killed himself, when of sound mind and of the age of discretion, the coroner shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or custom of England be interred if the verdict of *felo de se* had not been found against such person; such interment to be made within twenty-four hours from the finding of the inquisition, and to take place within the hours of nine and twelve at night." By s. 2, and without the rights of Christian burial. *See ante*, vol. ii. p. 10.

[5] The court will grant a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement be correct, and the party has no malicious motive in the publication. *Rex v. Flint*, 1 B. & A. 379; see *Rex v. Clement*, 4 B. & Adol. 218; S. C. 11 Price, 68; and *Duncan v. Thwaites*, 3 B. & C. 556.

[6] A party who has no interest in an inquest may be expelled the room by the coroner. *Garnett v. Ferrand*, 6 B. & C. 611.

[7] A coroner's inquisition touching the death of V., found, as the cause of death, "that a certain locomotive steam-engine, numbered 48, with a certain tender attached thereto and worked therewith, and also with drivers, to wit, three carriages used for the conveyance of passengers for hire on a certain railroad or tramway called 'The Midland Railway,' there situate, and which said carriages respectively were then and there attached and fastened together and to the said tender, and were then and there propelled by the said locomotive steam-engine,

Inquisitions are not liable to be quashed for mere technical defects; and where such occur, they may be amended.

By the 6 & 7 Vic. c. 83, s. 2, it is enacted, that "no inquisition found upon or by any coroner's inquest, nor any judgment recorded upon or by virtue of any such inquisition, shall be quashed, stayed, or reversed for want of the averment therein of any matter unnecessary to be proved, nor for the omission of the words 'with force and arms,' or of the words 'against the peace,' or of the words 'against the form of the statute;' nor for the omission or insertion of any other words or expressions of mere form or surplusage, nor for the insertion of the words 'upon their oath,' instead of the words 'upon their oaths;' nor for omitting to state the time at which the offence was committed, when time is not the essence of the offence; nor for stating the time imperfectly; nor because any person or persons mentioned in any such inquisition is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names; nor by reason of the non-insertion of the names of the jurors in the body of any such inquisition, or of any difference in the spelling of the names of the jurors in the body of any such inquisition, and the names subscribed thereto; nor because any juror or jurors shall have set his or their mark or marks to any such inquisition, instead of subscribing his or their names thereto; nor because any such mark or marks is or are unattested, provided the name or names of such juror or jurors is or are set forth; nor because any juror or jurors has or have signed his or their Christian name or names by means of an initial or partial signature only, and not at full length; nor because of any erasures or interlineations appearing in any such inquisition, unless the same shall be proved to have been made therein after the same was signed; nor for want of a proper venue, where the inquest shall appear, or purport to have been taken, by a coroner of or for the county, riding, city, borough, liberty, division, or place in which it shall appear, or purport to have been taken; nor (except only in cases of murder or manslaughter) for or by reason of any such inquisition not being duly sealed or written upon parchment; nor by reason of such inquisition having been taken before any deputy, instead of the coroner himself; nor because the coroner and jury did not all view the body at the first sitting of the inquest; and in all or any of such cases of technical defect as are hereinbefore mentioned, it shall be lawful for any judge of either of her Majesty's courts at Westminster, or any judge of assize or gaol delivery, if he shall so think fit, upon the occasion of any such inquisition being called in question before him, to order the same to be amended in any of the respects aforesaid, and the same shall forthwith be amended accordingly."

XI. Relative to the Forfeiture occasioned by the Accused Absconding.[1]

XII. „ Admissibility of Proceedings taken before a Coroner,[2] and of the Coroner being a Witness. *See* Witness.

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and which said locomotive steam-engine, tender, and carriages were then and there moving and travelling along the said railroad or tramway towards the town and county of the town of Nottingham; and the jurors aforesaid, upon their oaths aforesaid, do further say, that whilst and during the time that the same locomotive, &c.," averring a collision with a train in which V. was travelling, but not so as to be intelligible without the earlier part of the finding. The court quashed the inquisition, holding that the words, "and which said locomotive engine, tender, and carriages," could not be rejected as surplusage, for the purpose of rendering the previous words sensible. *R. v. Midland Railway Co.* 8 Q. B. 587.

The inquisition will not be quashed on the mere ground that the coroner misdirected the jury: there must be a defect or error on the face of the inquisition to induce the court to quash it. *Reg. v. M'Intosh*, 7 W. R. Q. B. 52; 32 L. T. Q. B. 146.

A coroner cannot take a second inquisition on the same body while a former inquisition is valid and subsisting. *Reg. v. White*, 8 W. R. 580; 36 L. T. Q. B. 463.

The 14 & 15 Vic. c. 100, applies to inquisitions as well as indictments.

In cases of manslaughter or murder, the inquisition must still be sealed, and written on parchment. *R. v. Whalley*, 12 L. J. Q. B. 14.

[1] Absconding in contemplation of an anticipated inquisition or after, occasions a forfeiture of the property of the accused. 2 Hale, P. C. 62; Jer. Cor. 207.

[2] It seems doubtful whether a coroner's inquisition can be given in evidence in a civil proceeding. 1 Stra. 68. Depositions

XIII. Relative to the Proceedings on the Death of a Coroner.[1]
XIV. „ Effect of the Inquest.[2] *See* Inquisition, p. 258.

CORPORATIONS. *See* Municipal, *post*, p. 267.

I. Generally.[3]
II. Contracts of, p. 263.
(A) *Contracts must, in general, be under Seal*, p. 263.
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II. Contracts.

(A) *Contracts must, in general, be under Seal.*

London Dock Company v. Sinnott, 8 E. & B. 347.

A corporation aggregate is in general

This was an action by a corporation, incorporated as a Dock Company by a statute containing no express provisions as to the manner in which the corpora-

before a coroner are not evidence, though he and the deponent are both dead, unless he has signed them. 2 Leach, C. L. 770; 3 Salk. 100.

[1] On the coroner's death, the candidate who wishes to succeed must apply for the writ *De coronatore eligendo*, and produce an affidavit of the death, to be made by a person who has seen the deceased coroner, which is lodged with the clerk of the crown in Chancery, when a writ is sealed and delivered to the sheriff, and the election takes place. Umf. on Cor. 162; Imp. Sheriff, 205.

[2] Deodands and forfeiture of chattels moving to or causing death were abolished by 9 & 10 Vic. c. 62. The finding of a jury, it is said, throws the burthen of proof in civil cases on the party alleging the contrary. 25 Beav. 605.

[3] A corporation is a collection of many persons united into one body under a special denomination (a corporate name is essential to it), having perpetual succession under an artificial form, and is vested by the policy of the law with the capacity of acting in several respects as an individual. Corporations may take and grant property, enter into contracts, sue and be sued, and enjoy privileges and immunities in common. Some individuals partake of the properties of a corporation; hence, corporations are divided into two classes, aggregate and sole. Corporations aggregate consist of many persons united together into one society, and their perpetual existence secured by the admission of new members. The most prominent of this kind are the mayor and commonalty of a city, the head and fellows of a college, and the dean and chapter of a cathedral church. The exclusive right of the Crown to institute corporations, and a necessity for its express or implied consent to their existence, is undoubted. There are, indeed, certain corporations which exist solely by force of the common law. *See* Grant on Corporations.

Corporations may be created by act of parliament, but generally by charter; and as the right of granting charters of this description is viewed as an important prerogative of the Crown, the legislature seldom interferes. To give efficiency to the charter it must be accepted by the grantees. No particular ceremony or technical ob ervancies are necessary to constitute an acceptance; their acquiescing in the grant, even for a brief interval, determines their election and renders the acceptance irrevocable. It is universally admitted that the charter by which a body is incorporated must be accepted as it is offered; a part of its provisions cannot be repudiated and a part accepted.

A common seal is indispensable, for a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its acknowledged seal. One of the essential attributes of a corporate body is its power to make, alter, or repeal bye-laws or private statutes for the better government of the corporations, which are binding upon themselves, unless contrary to the laws of the land, or inconsistent with their charter, or manifestly unreasonable, and then they are void. Grant on Corp.

In regard to appointments and elections it is a valid bye-law which imposes a penalty on such members as reject a burdensome office, and so is one restraining the number of electors, but not to strike off an integral part of them; neither can it narrow the description of persons eligible. They may be enforced by moderate pecuniary penalties. 1 T. R. 124. A bye-law, according to a pre existing usage, to exclude foreigners or intruding dealers from a town, is valid; but not in the absence of a custom. Every member is bound to take notice of a bye-law. Individual notice is not necessary. A dissolution of a corporate body may take place by the loss of one or more of its integral parts. So it may be dissolved by misuse of its privileges, or abuse of them.

bound only by contracts under the seal of the corporation.[1]

tion might be bound by contracts. The action was on an agreement to execute a contract under seal for scavenging the docks for a year. *Plea*, that the agreement on behalf of the corporation was by parol only, and not authorised under its seal. On demurrer to the plea,—

Campbell, C. J. "In support of this plea it was contended before us that a corporation constituted as this is, for the purpose of carrying on a particular trade, cannot enter into binding contracts for carrying on that trade, except under the corporation seal, and that the cases in which this court has held the contrary must be considered as overruled by the late decision in the House of Lords of *Ernest v. Nicholls*. 6 H. of L. C. 401. By what is decided in that case, of course, we are bound; and we may add, that we should have entirely concurred in that decision: for although a trading corporation may have power to enter into a binding contract without seal to carry on the trade for which it is constituted, a parol contract to sell the business of the company, and put an end to its trading, must be void. According to the printed report of that case, a noble and learned lord *obiter* observed, that he disapproved of the decision of this court upon this subject; but he himself said, 'It is quite unnecessary to discuss this point now, because this is not a question about goods supplied or services performed in the way of trade in the ordinary course, but a question as to a special contract to do the very unusual thing of purchasing by one company the trade of another.' We therefore think that we are not prevented by this case from still adhering to the doctrine upon this subject which we had propounded. But, consistently with that doctrine, it appears to us in this case the plea is a good bar to the action. The contract is not of a mercantile nature; it is not with a customer of the company; it is not of a character which creates an impossibility that it should be under seal as becoming party to a bill of exchange: on the contrary, such a contract may more conveniently be under seal than by parol. Therefore we do think, that no power to enter into such a contract by parol is conferred upon the corporation of the London Docks, and that the plaintiffs should not bring themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation."

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[1] In the *East London Waterworks Co. v. Bailey*, 4 Bing. 283, 12 Moore, 532, *Best, C. J.*, thus stated the law:—"It is clear as a general rule, that a corporation cannot express its will except by writing under the common seal of the body corporate. It has, indeed, been contended at the bar, that this rule is confined to contracts affecting real property; but the rule is by no means so confined, although undoubtedly it is subject to some exceptions: these are to be found in Brooke's Abridgment, title, Corporations, pl. 34, *et seq.*

"The first is where the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as was decided in the *Mayor and Corporation of Stafford v. Till*, 4 Bing. 75; S. C. 12 Moore, 260; where it was holden that a corporation might maintain assumpsit for the use and occupation of their land.

"The next exception is where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal. All these are enumerated in Bro. Abr. Corporation, 56; and in *Horn v. Ivy*, 1 Vent. 47.

"Another exception is, where a corporation has a head, as a mayor or a dean, who may give commands which a party may obey without the sanction of a common seal (*Randall v. Deane*, 2 Lutw. 631), or may bind the corporation by record. Vin. Abr. tit. Corporation, K. 721.

"A fourth exception is, where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal. As to where cattle are to be distrained damage feasant, which might escape before the seal could be affixed. *Manby v. Long*, 3 Lev. 107.

"But it is only in cases of necessity, occasioned by the hurry of the proceedings, that such a course can be pursued; for in *Horn v. Ivy*, 1 Vent. 47, it is laid down that the appointment of the bailiff, who is to make distresses for the corporation, must be under seal.

"The principle of necessity applies to corporations created for purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes. But this indulgence is not extended beyond cases of necessity: for in *Slark v. the Highgate Archway Co.* 5 Taunt. 792, the court said, that 'assumpsit on notes would not lie against a corporation, unless the act which authorised the making of the promissory notes *eo nomine*, by the corporation, *ex vi termini*, impliedly empowered the corporation to make a pro-

mise.' And in *Boughton v. the Manchester Waterworks Co.* 3 B. & A. 12, which I should not cite, but that my judgment in the case has been confirmed by a decision in this court, I am reported, and correctly, to have said: — 'When a company like the Bank of England or East India Company are incorporated for the purposes of trade, it seems to result, from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes.'"

Corporations, like individuals, have the power to contract; but their contracts must, in general, we have seen, be under their corporate seal (*Mayor of Ludlow v. Charlton*, 6 Mee. & W. 815; Bac. Abr. Corporations (E), 3. *Rex v. Bigg*, 3 P. Wms. 432, 434. *The King v. the Inhabitants of Chipping Norton*, 5 East, 239. *Yarborough v. the Bank of England*, 16 East, 11); which must be affixed with intent to render the instrument effectual and operative, although no formal delivery thereof is necessary. *Derby Canal Co. v. Wilmot*, 9 East, 360. See *Clark v. the Imperial Gas-Light Co.* 1 Nev. & M. 206; S. C. 4 B. & Adol. 315. For general purposes, not affecting the interest or title of the corporation, a corporation may act through the medium of an agent, although he possesses no authority under seal. *Roe v. Pearce*, 2 Camp. 96; and *see* Russell on Factors, 11 Chit. Contr. 247. But a corporation cannot, in general, appoint an attorney except under the corporate seal. *Arnold v. Mayor of Poole*, 4 Man. & G. 860. *Reg. v. Mayor of Stamford*, 6 Q. B. 433, 443.

When the nature of the constitution of a trading corporation is such as to render the drawing of bills, or the constant making of any particular sort of contracts, necessary for the purposes of the corporation, such contracts are valid, although they were not entered into under the corporate seal. *Mayor of Ludlow v. Charlton*, 6 Mee. & W. 815, 821. *Beverly v. Lincoln Gas-Light Co.* 6 Ad. & E. 829. *Paine v. Strand Union*, 8 Q. B. 326, 340. *Murray v. East India Co.* 5 B. & A. 204.

On this point the court of Queen's Bench has decided, that it makes no difference as to the right of a corporation to sue on a contract entered into by them, without seal, whether such contract be executed or executory. 6 Ad. & E. 846.

A corporation may maintain use and occupation where a house, the property of the corporation, has been occupied by their license, although there has been no demise under seal. *Finley v. the Bristol and Exeter Railway Co.* 7 Ex. 416; 21 L. J. Ex. 117. And see *the Southwark Bridge Company v. Sills*, 2 Car. & P. 371; S. P. *Dean, &c. of Rochester v. Pierce*, 1 Camp. 466. A receipt of the rent is evidence as against the corporation of a demise by them from year to year. *Doe d. Pennington v. Taniere*, 18 L. J. Q. B. 49. And a gas-light company may, it has been held, maintain assumpsit for gas actually supplied. *Gas-Light Company v. Nicholls*, 2 Car. & P. 365. See *Dunstan v. the Imperial Gas Co.* 3 B. & Adol. 125.

The mayor and corporation of Monmouth were held to be liable in debt for weights and measures ordered by the mayor, which were examined and approved of at a corporation meeting. *De Grave v. the Mayor of Monmouth*, 4 Car. & P. 111.

As to the effect of the consideration being executed, see *Church v. Imperial Gas-Light Co.* 6 Ad. & E. 846. *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131, 192.

It has been decided, that if work done for a corporation has been adopted by them for purposes connected therewith, they cannot, in action to recover the price, object that no contract under seal has been proved against them. *Sanders v. St. Neott's Union*, 8 Q. B. 810. See *Lamprell v. Guardians of Billericay Union*, 3 Ex. 283.

If a corporation were to sue on an executory contract not under their corporate seal, and the other contracting party were afterwards to bring an action against the corporation on the same contract, it appears that the record in the former action would amount to an estoppel to the corporation, from denying the obligatory force of that contract in such subsequent action against themselves. *Per Cur.: Fishmonger's Co. v. Robertson*, 5 Man. & G. 131, 193.

An agreement by a corporation to pay a salary to their attorney must in general be under seal. See *Reg. v. Mayor of Stamford*, 6 Q. B. 433. But where it appeared that the act of parliament which incorporated the company enacted that all the costs of obtaining the act should be paid and discharged out of the monies subscribed, in preference to all other payments, it was held that the attorney who obtained the act might, independently of any such agreement, sue the company for his costs, in an action of debt founded upon the statute. *Tilson v. Warwick Gas-Light Co.* 7 D. & R. 376; S. C. 4 B. & C. 962; and see *Gardner v. General Cemetery Co.* 7 Scott, 97.

And where a company was incorporated by act of parliament, by which they were authorised to obtain water from a specified source for the supply of a certain specified district, and the supply of water becoming insufficient for the increased population, the committee of management, acting under a resolution carried at a general meeting of the shareholders, employed an engineer to make plans in connexion with a scheme for obtaining a fresh supply from a different source, and to supply a district extending over a wider area, and including the old district, to be submitted to parliament upon an application for a bill authorising the works for the supply of such district, and the raising of additional capital, it was held that the engineer was entitled to sue the company for his charges in preparing the plans. *Bateman v. Corporation of Ashton-under-Lyne*, 3 H. & N. 323.

It seems that a foreign corporation may sue in this country by their corporate name. *The National Bank St. Charles v. Ber-*

III. Liability of, for Torts.[1]

(A) *An Action of Tort is maintainable against a Corporation.*

Green v. The London General Omnibus Co. 29 L. J. C. P. 13.

An action against an incorporated omnibus company for driving their omnibuses in such a manner as to molest the plaintiff in the use of the highway was held maintainable.

Erle, J., delivering the considered judgment of the court: "This was an action brought against the defendants for interfering with the right of the plaintiff, by driving their omnibuses in such a manner as to molest him in the use of the highway. The declaration sets out various grievances that fall under that general description. There is a demurrer to that declaration, and on that demurrer we are called upon to give our opinion whether the action lies; and the ground of the demurrer relied upon for the defendants is that the charge is a charge of a wilful and intentional wrong, and that a corporation cannot be guilty of such a wrong, and therefore that the action does not lie. But I should state that the whole of the acts that are charged against the defendants are acts connected with the driving of their vehicles; and this is a company incorporated for the purpose of driving omnibuses, and therefore the actual things done by the defendants are acts within the purpose of their incorporation. Unless they had been wrongfully done, of course there could be no ground of complaint; but being wrongfully done we think that the action lies, and there are abundant authorities to show that under these circumstances the action will lie. I take the whole tenor of authorities from *Yarborough v. The Bank of England* (16 East, 6), down to the case of *Whitfield v. The South-Eastern Counties Railway Co.* (1 E. B. & E. 115), to show that an action for a wrong does lie against a corporation, where the thing done is within the purpose of the incorporation, and that it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual. The doctrine that was relied upon by Mr. Giffard is rather more of a quaint than a substantial form, — that because a corporation has no soul, therefore it is incapable of a malicious intention. We do not in the smallest degree interfere with prior decisions, but on the contrary there are numerous authorities, of which *Yarborough v. The Bank of England* (where there was a well-considered and elaborate judgment going over all the previous cases) is by no means the first in support of the principle upon which we rely; and I may add, as an additional reason for our decision, the inconvenience to the public that would arise if we were to hold that these companies, incorporated for the purpose of trade, had a restricted limitation put upon their liability by reason of such incorporation, and were exempt from responsibility because they intentionally wronged the public. We think it extremely important, where such companies admit that they have intentionally committed a wrong, that the public should have a remedy against them, and not be driven to an action against their servants and others whom they have employed, and who may be entirely incapable of giving the recompense which the law may award." Judgment for the plaintiff.

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nales, 1 Car. & P. 569; S. C. R. & M. 190.

As to the contracts of joint-stock companies, *see post*, Joint-Stock Companies.

[1] By accepting a grant of land from the Crown upon conditions as to the repair of sea-walls and defences, a corporation may render itself liable to an action of tort at the suit of any person sustaining a private and peculiar damage from the want of repair of such sea-wall. *Mayor, &c. of Lyme Regis v. Henley*, 1 Bing. N. C. 240.

A corporation may give a warrant to distrain without deed, and thus render itself responsible for a wrongful distress; and the jury may infer the agency of the corporation in the matter of a wrongful distress or seizure of goods from the fact of their having received the proceeds of the seizure. *Smith v. Birmingham Gas Co.* 1 Ad. & E. 526.

And a corporation may be made responsible for an action for a trespass in breaking and entering a close, and for seizing goods, for every corporate body is liable in tort for the tortuous acts of its agents or servants acting in the ordinary service of the corporation, without any order or authority under its common seal. *Maund v. Monmouth Railway Co.* 4 Man. & G. 452; 5 Scott, N. R.

CORPORATIONS, Municipal.[1]

I. Relative to the Creation of, p. 272.

(A) *Before* 5 & 6 *Wm.* 4, *c.* 76, p. 272.

(*a*) *By Implication*, p. 272.

(*b*) *By Charter*, p. 272.

(*c*) *By Letters Patent*, p. 272.

(*d*) *By Statute*, p. 272.

(B) *Since* 4 & 5 *Wm.* 4, *c.* 76, p. 272.

457. *Scott v. Mayor of Manchester*, 2 H. & N. 204.

So a corporation may become responsible for an assault and false imprisonment committed by its officers or servants in the course of their duty; as, where the servants of a railway company wrongfully eject a passenger from the carriages, or give him into custody under the mistaken notion that he has infringed a bye-law. *Eastern Counties Railway Co. v. Broom*, 6 Ex. 314.

So, an action has been held maintainable against a municipal corporation for an injury sustained by the defective construction of a washing machine which had been erected by the corporation, and was at the time of the accident being used by the person injured, for reward paid to the corporation. *Cowley v. The Corporation of Sunderland*, 30 L. J. Ex. 127.

Even where malice is the foundation of the action, a corporation aggregate may be subject to it. Thus, express malice may be imputed to and proved against a corporation; and an action for libel was recently maintained against a corporation for the publication of libellous intelligence through the medium of their servants acting in the course of their ordinary employment, in the management of an electric telegraph. *Whitfield v. The South-Eastern Railway Co.* 1 E. B. & E. 121; 27 L. J. Q. B. 229.

In the case of trading corporations, the corporation may be made responsible for a conversion of property by the servants or agents through the instrumentality of whom they carry on the trade, when acting in the ordinary course of their employment in the business of the corporation. *Giles v. Taff Vale Rail. Co.* 2 E. & B. 831. And if it be essential to the conversion of property by a corporation that the act of conversion should have been authorised by them under their common seal, a jury may, from proof that the conversion was committed by the servants and agents of the corporation in the exercise of their ordinary employment and service, presume that the act was done under the common seal. *Yarborough v. Bank of England*, 16 East, 6.

[1] The Municipal Corporations Act, 5 & 6 Wm. 4, c. 76, introduced so many important alterations with respect to the corporate bodies mentioned in the schedules to the statute, as virtually to create new corporations. It has therefore been considered desirable to give an analysis of the act, as well as an alphabetical list of corporations specified in the statute. By sections,—

1. Repeal of all acts, charters, and customs inconsistent with this act.

2. Reservation of all rights of property and beneficial exemptions to freemen, their wives and children.

3. No freedom to be acquired by gift or purchase.

4. Reservation of the parliamentary franchise to freemen.

5. Freemen's roll to be made out and kept by the town-clerk.

6. Corporations to be styled mayor, aldermen, and burgesses.

7. Boundaries of certain boroughs to be those settled by 2 & 3 Wm. 4, c. 64. Boundaries of other boroughs to remain until altered by parliament.

8. Every place included within the bounds of a borough to be part of such borough. Parts cut off from the borough to be declared part of adjoining county.

9. Occupiers of houses and shops, rated for three years to the relief of the poor, entitled to be burgesses, if resident householders within seven miles. Aliens and persons who have received parochial relief not to be inrolled.

10. Medical assistance or instruction in endowed schools not to be a cause of disqualification.

11. Occupiers may claim to be rated.

12. In cases of titles by descent, &c., how the occupation is to be reckoned.

13. No new burgesses to be admitted who are not qualified under this act.

14. Exclusive rights of trading abolished.

15. Overseers to make lists of all persons entitled to be burgesses in their respective parishes.

16. As to boroughs in which there is no town-clerk. As to precincts, &c., where there are no overseers.

17. Persons omitted from the overseers' lists to give notice to the town-clerk. Notices as to persons not entitled to be retained in the lists. Lists of claimants, and of persons objected to, to be published, &c.

18. Mayor and assessors to revise lists, and upon due proof to insert and expunge names.

19. Power to mayor, &c., of adjourning, administering oaths, &c. Mayor shall sign the lists in open court.

II. Relative to the Compensation to Corporate Officers under 5 & 6 Wm. 4, c. 76, p. 272.

III. „ Officers connected with, p. 274.

(A) *Before* 5 & 6 *Wm.* 4, *c.* 76, p. 274.

(*a*) *As to Aldermen*, p. 274.

(*b*) „ *Articled Clerks being Burgesses*, p. 274.

(*c*) „ *Sheriffs*, p. 274.

(*d*) *Of Removing Officers*, p. 274.

(B) *Since the* 5 *&* 6 *Wm.* 4, *c.* 76, p. 274.

(*a*) *As to the Crier*, p. 274.

(*b*) „ *Sheriffs*, p. 274.

(C) *As to the Election*, p. 274.

(*a*) *Before* 5 *&* 6 *Wm.* 4, *c.* 76, p. 274.

(1) *Of the Candidate*, p. 275.

(2) *As to the Mode of Election*, p. 275.

(3) *As to Invalid Elections*, p. 275.

(4) *Of the Admission*, p. 275.

(*b*) *Since the* 5 *&* 6 *Wm.* 4, *c.* 76, p. 276.

(1) *Election of Aldermen*, p. 276.

(2) „ *Councillors*, p. 276.

(3) *Limitation of Time for Objecting to Election*, p. 277.

(4) Mandamus *or* Quo Warranto *connected with Election*, p. 278.

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20. Barristers to be appointed to revise lists in the first year.

21. Affirmation may be substituted for oath.

22. Revised borough lists to be kept by the town-clerk, and copied into books, with the names numbered; such book to be the roll of burgesses entitled to vote. No stamp-duty on inrolment.

23. Copies of the burgess-roll to be printed for sale.

24. Expenses of overseers, how to be defrayed.

25. Mayor, aldermen, and councillors to be chosen in every borough, who together shall constitute the council of the borough.

26. Mayor and aldermen to continue to be members of the council during their offices.

27. Future vacancies in the office of aldermen, how to be filled up.

28. Who are not qualified to be chosen mayor or councillor.

29. Who shall vote in the election for councillors.

30. Councillors to be chosen on the 1st of November in every year.

31. One-third part of the council to go out of office annually.

32. Elections to be held before the mayor and assessors. Mode of voting.

33. Polling-booths to be provided.

34. No inquiry of the voter except as to his identity, and whether he has voted before at the same election. Forms of questions as to these points.

35. Result of election, how to be declared.

36. An alderman to be chosen to preside at election, in case of the death or inability of the mayor.

37. Election of auditors and assessors.

38. Existing mayors and councillors to go out of office, on election of councillors under this act.

39. Where boroughs are to be divided into wards, the bounds of the wards to be determined by the barristers appointed to revise the lists.

40. Number of councillors for each ward to be assigned by the barristers according to certain rules.

41. Apportionment of councillors for each ward in which the ancient division is adhered to.

42. Power to examine rate-books.

43. Councillors and assessors to be elected in wards, by the burgesses of such wards.

44. Burgesses to vote in the ward in which their property is situated.

45. Lists of the burgesses in each ward to be made out yearly.

46. Manner of proceeding if any person is elected a councillor in more than one ward.

IV. Relative to the Duties of, p. 278.

(A) *Before* 5 & 6 *Wm.* 4, *c.* 76, p. 278.

(*a*) *A Resolution by a Corporation not under Seal is not binding*, p. 278.

(B) *Since* 5 & 6 *Wm.* 4, *c.* 76, p. 279.

V. Relative to the Privileges of, since 5 & 6 Wm. 4, c. 76, p. 279.

VI. „ „ Rights of, p. 279, and Liabilities of, p. 280.

(A) *In General, before* 5 & 6 *Wm.* 4, *c.* 76, p. 280.

(B) *To make Bye-Laws*, p. 280.

(*a*) *Before* 5 & 6 *Wm.* 4, *c.* 76, p. 280.

(1) *The Power to make Bye-Laws does not sanction Bye-Laws in Restraint of Trade*, p. 280.

(*b*) *Since* 5 & 6 *Wm.* 4, *c.* 76, p. 281.

(1) *Power of Municipal Corporations to make Bye-Laws*, p. 281.

47. Occasional vacancies of councillor, auditor, or assessor to be filled up by fresh election.

48. Penalties on mayor, overseers, &c., neglecting to comply with provisions of this act.

49. Councillors to elect the mayor every year from the councillors.

50. Mayor, aldermen, and councillors, auditors, and assessors, not to act until they have made a declaration of acceptance of office. Aldermen, if required, to make a declaration of qualification once in three years.

51. Every burgess elected to the office of alderman, councillor, auditor, or assessor, and every councillor elected to the office of mayor, shall accept the office, or pay a fine to the borough fund. Exemptions.

52. Any mayor, alderman, or councillor, if he shall be declared bankrupt or insolvent, or absent himself from the borough, shall lose his office.

53. Penalty on persons not qualified, &c., acting as mayor, alderman, or councillor. Proviso.

54. Persons convicted of bribery disqualified from voting at any election in the borough.

55. Persons offending in any of the cases aforesaid, discovering others so offending, to be discharged from all penalties.

56. No person liable to incapacity, penalty, &c., unless prosecuted within two years.

57. The mayor to be a justice of the peace for the borough, and returning officer at elections of members to serve in parliament.

58. Power to council to appoint town-clerk, treasurer, and other officers, and to take security for due discharge of their official duties. Salaries.

59. To pay no money but by order of council.

60. Officers to account, &c., according to the orders of the council.—Summary remedy against officers for not accounting, &c. Proviso. Remedy by action.

61. Councils of cities and towns which are counties to name a sheriff.

62. In certain boroughs council to appoint a coroner.

63. Coroners to make returns to secretary of state.

64. County coroners to act in other boroughs.

65. Council empowered to remove certain officers. Such officers to continue until removed.

66. Officers to receive compensation on removal; and to deliver statement of claims.

67. Compensation to be secured by bond under common seal.

68. Reservation of certain pensions and allowances.

69. All acts of the council to be decided by a majority of councillors present; one-third part of the whole number to be a quorum. Notice of meetings of council; quarterly meetings of council.

70. Council may appoint committees.

71. Charitable trustees.

72. Council to act as trustees where corporators were *ex officio* sole trustees.

73. Council to appoint a limited number of councillors to be joint trustees for certain purposes.

74. Present trustees of certain acts continued for a definite time. Trustees not to go out of office by reason of ceasing to be of the council until the time prescribed by the terms of the trust.

75. Powers vested in trustees may be transferred to councillors.

76. A watch committee to be appointed, to consist of the mayor and councilmen; such committee to appoint constables for the borough. Constables to be for the county, &c., as well as borough.

77. Watch committee to make regulations for the management of the constables.

78. Power to constables to apprehend disorderly persons, &c.

VII. Relative to Customs connected with, p. 281.
VIII. „ the Jurisdiction of Justices under 5 & 6 Wm. 4, p. 281.
IX. „ „ Courts within the 5 & 6 Wm. 4, c. 76, p. 282.
X. „ „ Burgess-Roll, p. 282.
XI. „ „ Borough-Rate under the 5 & 6 Wm. 4, c. 76, p. 282.
XII. „ „ Remedies connected with, p. 285.
(A) *Actions by*, p. 285.
(B) *Evidence*, p. 286.
XIII. Relative to Corporations Foreign, and Scotch Burghs, p. 286.

79. Constables attending at the watch-houses in the night may take bail by recognisance from persons brought before them for petty misdemeanors, such recognisance to be conditioned for the appearance of the parties before a magistrate. In default of appearance recognisance to be forfeited. Time of hearing may be postponed.

80. Penalties on constables for neglect of duty.

81. Penalty for assaults on constables. Proviso.

82. Regulation and payment of expenses. Rewards for activity, &c.

83. Magistrates to appoint annually a certain number of persons to act as special constables. Payment of special constables.

84. On notice of appointment of constables, the present provisions in local acts as to watching, &c., to cease. Watch-boxes, arms, &c., to be given up for the use of the constables appointed under this act. Penalty for not giving them up.

85. Proviso as to rates in arrear and as to debts.

86. Watch committee to transmit a report quarterly to the secretary of state; and also a copy of their rules, &c.

87. Power for council to order parts of a borough not within a local act as to lighting to be included in such act. Proviso as to amount of rate for lighting.

88. Council may assume the powers of inspectors under 3 & 4 Wm. 4, c. 90, for lighting any part of the borough not within a local act for lighting the same.

89. Act not to interfere with the regulations for the government, &c. of dockyards, arsenals, &c.

90. Council to have power to make bye-laws.

91. As to breaches of bye-laws.

92. All corporate property and all fines received to be carried to the account of the borough fund. Payment of debts, &c., salaries of recorder, town-clerk, treasurer, and other officers, and election expenses, to be paid out of such fund. Application of surplus; if the fund be insufficient, the council shall order a rate to make up the deficiency.

93. Accounts of receipts and disbursements to be kept, audited, and published.

94. Power of sale and leasing restrained.

95. The council of any borough under this act authorised to renew leases, &c.

96. Leases of certain buildings, and of ground for building on, or for making gardens, &c., may be made for seventy-five years.

97. Collusive purchases, sales, and demises of corporate property, since the 5th June, 1835, for undue consideration may be set aside.

98. His Majesty's commission may be issued for certain persons to act as justices in any of such boroughs.

99. Council may make bye-laws, on which the Crown may appoint salaried justices.

100. Council to provide a police-office.

101. Justices need not be qualified by estate. Such justices not to sit in courts of gaol delivery, &c.

102. Justices to appoint a clerk, who shall not be clerk of the peace, or an alderman or councillor, nor be concerned in the prosecution of offenders committed by the borough justices.

103. His Majesty may grant a separate court of quarter sessions, and appoint a recorder in certain boroughs. Recorder to be a justice of the peace for the borough; but not a member of parliament for the borough, alderman, councillor, or police magistrate.

104. Recorder and justices to make declaration before acting.

105. Sessions of the peace to be held for the borough, of which the recorder to be the sole judge. Recorder not to make or levy county rate, &c.

106. Mayor, in the absence of the recorder and deputy-recorder, may open and adjourn the court.

107. Capital jurisdictions, and all other criminal jurisdictions in boroughs other than are specified in this act, abolished.

108. Chartered admiralty jurisdictions abolished.

109. Certain exceptions in 38 Geo. 3, c. 52, repealed. Berwick-upon-Tweed to be a county of a town. As to trial of offences committed in counties of cities and towns corporate.

110. Offenders committed to borough sessions whose jurisdiction is taken away to be tried in the adjoining county.

111. County justices to have jurisdiction in all boroughs which have not a separate court of quarter sessions of the peace under this act.

112. Certain boroughs not to be assessed to county rates.

113. Boroughs to pay the expenses of prosecution at the assizes.

114. Treasurers of counties to keep an account of expenses of prosecution of offenders sent by such boroughs for trial at the assizes, and make order on them for payment thereof. In case of difference respecting such account, the same to be referred to arbitration, as provided in 5 Geo. 4, c. 85.

115. Council may contract for committing prisoners to the gaol of another borough, if sufficient.

116. Council of certain boroughs to have the same powers under the acts 4 Geo. 4, c. 64, and 5 Geo. 4, c. 85, as justices of peace have at their sessions in counties.

117. Boroughs to pay a proportion of the other county expenditure.

118. Borough courts of record to be holden as heretofore, but in certain cases with extended jurisdiction. Proviso.

119. Council to appoint registrar and other necessary officers of the court.

120. Existing suits not to abate by reason of the change of jurisdiction.

121. Who to be jurors. Summoning of jurors, &c. Fine on jurors for non-attendance.

122. Members of the council, &c., exempt from serving on juries; burgesses of boroughs which have quarter sessions exempt from juries of county quarter sessions.

123. All chartered exemptions from serving on juries abolished. 6 Geo. 4, c. 50, in part repealed.

124. Fees payable to the clerk of the peace, clerk to the magistrates, and registrar and officers of the court of record.

125. Table of fees to be hung up.

126. Application of penalties.

127. Limitation of time for prosecution of offences punishable on summary conviction.

128. Power to summon witnesses. Penalty for disobedience of summons, &c. No witness or justice to be incompetent on the ground of ratability.

129. Payment of penalties may be levied by distress or offender imprisoned.

130. Form of conviction.

131. Appeal against convictions under this act.

132. No certiorari, &c. as to informality in warrants, &c.

133. Venue in proceedings against persons acting under this act. Notice of action; general issue, tender of amends, &c.

134. Jurisdiction of the Cinque Ports preserved.

135. Jurisdiction of the Cinque Ports further preserved. Proviso as to juries in the Cinque Ports' liberties.

136. Act not to affect letters patent founding a grammar-school at Louth.

137. Saving of the rights of the universities of Oxford and Cambridge.

138. Not to affect jurisdiction over precincts of cathedrals nor rights of university of Durham.

139. In cases where bodies corporate are seised in their corporate capacity of advowsons, &c., the same may be sold as ecclesiastical commissioners may direct. Vacancy arising before sale to be applied by bishop of the diocese.

140. Periods connected with first registration and election may be deferred by order in council.

141. The king empowered to grant charter of incorporation.

142. Interpretation clause.

143. Act may be altered this session.

The statute includes the following corporation boroughs, which are to have a commission of the peace:—

By section 1—

Aberystwith,
Abingdon,
Barnstaple,
Bath,
Bedford,
Berwick-upon-Tweed,
Bridgewater,
Bridport,
Bristol,
Bury St. Edmunds,
Cambridge,
Canterbury,
Cardiff,
Carlisle,
Carmarthen,
Caernarvon,
Chester,
Chichester,
Colchester,
Dartmouth,
Denbigh,
Derby,
Devizes,
Dorchester,
Dover,
Durham,
Evesham,
Gateshead,
Gloucester,
Guildford,
Harwich,
Haverfordwest,
Hereford,
Hertford,
Kidderminster,
Kingston-upon-Hull
King's Lynn,
Leeds,
Leicester,
Leominster,
Lichfield,
Liverpool,
Macclesfield,
Monmouth,
Neath,
Newark,
Newcastle-under-Lyne,
Newcastle-upon-Tyne,
Newport, Monmouth,
Newport, Isle of Wight,
Northampton,
Norwich,
Nottingham,
Oxford,
Pembroke,
Poole,
Portsmouth,
Preston,
Reading,
Ripon,
Rochester,
St. Albans,
Sarum, New,
Scarborough,
Shrewsbury,
Southampton,
Stafford,
Stamford,
Stockport,
Sunderland,
Swansea,
Tiverton,
Truro,
Warwick,
Wells,
Weymouth and Melcombe Regis,
Wigan,
Winchester,
Windsor,
Worcester,
Yarmouth, Great.

By section 2—

Andover,
Banbury,
Beverley,
Bewdley,
Bideford,
Boston,
Brecon,

I. Relative to the Creation of.

(A) *Before* 5 & 6 *Wm.* 4, *c.* 76.

(*a*) *By Implication.*[1]

(*b*) *By Charter.*[2]

(*c*) *By Letters Patent.*[3]

(*d*) *By Statute.*[4]

(B) *Since* 4 & 5 *Wm.* 4, *c.* 76.[5]

II. Relative to the Compensation to Corporate Officers under 5 & 6 Wm. 4, c. 76.[6]

Bridgnorth,
Clitheroe,
Chesterfield,
Congleton,
Coventry,
Deal,
Doncaster,
Exeter,
Falmouth,
Grantham,
Gravesend,
Grimsby,
Hastings,
Kingston-upon-Thames,
Lancaster,
Lincoln,
Liskeard,
Louth,
Ludlow,
Maidstone,
Maldon,
Newbury,
Oswestry,
Penzance,
Plymouth,
Pontefract,
Richmond,
Romsey,
St. Ives,
Saffron Walden,
Stockton,
Tewkesbury,
Walsall,
Welchpool,
Wenlock,
Wisbeach,
York.

Boroughs which are not to have a commission of the peace unless on petition and grant:—

By section 1—
Arundel,
Beaumaris,
Cardigan,
Llanidloes,
Pwllheli,
Ruthin,
Tenby,
Thetford,
Totness.

By section 2—
Basingstoke,
Beccles,
Blandford Forum,
Bodmin,
Buckingham,
Calne,
Chard,
Chippenham,
Chipping Norton,
Daventry,
Droitwich,
Eye,
Faversham,
Folkestone,
Flint,
Glastonbury,
Godalming,
Godmanchester,
Helstone,
Huntingdon,
Hythe,
Launceston,
Llandovery,
Lyme Regis,
Lymington,
Maidenhead,
Marlborough,
Morpeth,
Penryn,
Retford, East,
Rye,
Sandwich,
Shaftesbury,
South Wold,
South Molton,
Stratford-on-Avon,
Tamworth,
Tenterden,
Torrington,
Wallingford,
Wycombe, Chepping.

As connected with corporations, *see* also 2 Wm. 4, cc. 69, 80; 6 & 7 Wm. 4, cc. 103, 104, 105; 7 Wm. 4, and 1 Vic. cc. 19, 81; 1 & 2 Vic. cc. 5, 15, 31, 35; 2 & 3 Vic. c. 27; 3 & 4 Vic. c. 28; 4 & 5 Vic. c. 48.

[1] Though there be not express words in a statute, persons may become a corporation by implication. *Conservators of the River Tone v. Ash*, 10 B. & C. 349.

[2] There is no particular mode of notifying the acceptance of a charter: it may be by electing a corporate officer under it. *Rex v. Hughes*, 7 B. & C. 708; 1 M. & R. 625.

But a corporation cannot accept a charter as to part. *Rex v. Westwood*, 4 B. & C. 781; 79 & R. 267; 7 Bing. 1. A charter was granted upon petition from the Commons in Edward 3, and promised to be confirmed under the Great Seal, and was accordingly done so by subsequent charter:—*Held*, that not being a joint act of the legislature, it might be varied by subsequent charter. *Rex v. Haythorne*, 5 B. & C. 410; 8 D. & R. 228.

The Tobacco-pipe Makers' Company's charter only applies to admitted members, and not all over the kingdom, as it professes. *Tobacco-pipe Makers' Company v. Woodroffe*, 7 B. & C. 838; 8 D. & R. 531.

[3] Upon a grant of letters patent to a corporation from the Crown, as a consideration for repairing sea-walls, &c., the acceptance of the letters patent renders the corporation liable to repair the sea-walls. *Mayor of Lyme Regis v. Henly*, 3 B. & Adol. 77; 5 Bing. 91; 3 M. & P. 278.

[4] Under a statute, persons may be a corporation for some purposes, and not for others. *Jeffreys v. Gurr*, 2 B. & Adol. 833.

[5] It seems that the 5 & 6 Wm. 4, c. 76, does not create a new corporation. *Corporation of Ludlow v. Tyler*, 7 Car. & P. 537.

A place being named in the Municipal Corporations Act is only *primâ facie* evidence that it is a corporation. *Rex v. Greene*, 1 Nev. & P. 631; 6 Ad. & E. 458.

[6] By the 5 & 6 Wm. 4, c. 76, s. 66, it is enacted, "that every officer of any borough or county, who shall be in any office of profit at the time of the passing of this act, whose office shall be abolished, or who shall be removed from his office under the provisions of this act, or who shall not be re-appointed as aforesaid, shall be entitled to have an adequate compensation, to be assessed by the council, and paid out of the borough fund, for the salary, fees, and emoluments of the office which he shall so cease to hold, regard being paid to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case; and every person entitled to

such compensation as aforesaid shall deliver to the town-clerk, or in case such person shall himself be town-clerk, then to the treasurer of the borough, a statement under the hand of such person, setting forth the amount received by him or his predecessors, in every year, during the period of five years next before the passing of this act, on account of the salary, fees, emoluments, profits, and perquisites, in respect whereof he shall claim such compensation, distinguishing the office, place, situation, employment, or appointment, in respect whereof the same shall have been received, and containing a declaration that the same is a true statement, according to the best of the knowledge, information, and belief of such person, and also setting forth the sum claimed by him as such compensation; and the town-clerk, or treasurer, as the case shall be, shall lay such statement before the council, who shall take the same into consideration, and determine thereon; and immediately upon such determination being made, the person preferring such claim, if he shall not himself be the town-clerk, shall be informed by notice in writing, under the hand of the town-clerk, and in case such claim shall be admitted in part, and disallowed in part, such notice shall specify the particulars in which the same shall have been admitted and disallowed respectively; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon, or in case one-third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive, it shall be lawful for the person preferring such claim, or any member of the council who shall subscribe such protest, to appeal to the lords commissioners of his Majesty's Treasury, who shall thereupon make such order as to them shall seem just; and such order, signed by three or more of such lords commissioners, shall be binding on all parties: Provided always, that if the council shall not determine on such claim within six calendar months after the aforesaid statement shall be delivered to the town-clerk or treasurer, as the case shall be, such claim shall be considered as admitted: Provided also, that it shall not be lawful for any member of the council to subscribe such protest as aforesaid, except within such period of six calendar months: Provided also, that the person preferring such claim, if any member of the council shall so require, upon receiving notice in writing signed by the town-clerk, unless such person shall himself be town-clerk, in such case no such notice shall be requisite, shall, from time to time, attend at any meeting, or adjourned meeting of the council, for the investigation of such claim, and then and there, upon his oath, or solemn affirmation, to be taken or made before the mayor (who is hereby authorised to administer the same), shall answer all such questions as shall be asked by any member of the council, touching the matters set forth in the statement subscribed by such person as aforesaid, and produce all books, papers, and writings in his possession, custody, or power relating thereto: Provided also, that every such officer, who shall be continued in, or re-appointed to such office, under the provisions of this act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this act, and had not been continued in or re-appointed to such office."

By s. 67 it is enacted, "that the sum payable to any person as such compensation as aforesaid shall be secured to such person by bond or obligation under the common seal of the borough out of whose funds the same shall be payable in a sufficient penalty, conditioned for the payment to such person, his executors, or administrators, or assigns, of such sum, with all arrears thereof (if any) accrued due before the date of such bond; and such bond or obligation shall be prepared and executed at the expense of the borough fund, and delivered to the person entitled to such compensation as soon as conveniently may be after the amount thereof shall have been admitted as aforesaid by the council of the borough, or shall have been determined in the event of such appeal as aforesaid by order of the said lords commissioners."

By s. 68 it is enacted, "that all pensions and allowances granted on or before the 5th of June in this present year, by the corporate body named in the said schedules (A.) and (B.) in conjunction with any borough, to any retired officer or servant, or to the widow or child of any officer or servant, and all stipends and allowances which during seven years next before the said 5th of June have been usually paid and granted to the minister or late minister of any church or chapel, or to the master or usher of any school, or to the governor or master of any hospital within such borough, and all charitable allowances which have been usually paid as aforesaid to the inmates of any almshouses by such corporate body, shall be secured as soon as conveniently may be after the passing of this act to every person entitled or accustomed to have and receive the same, by bond or obligation, under the common seal of the borough out of whose funds the same shall be payable, in a sufficient penalty conditioned for the payment to such person, his executors and administrators, of such pension, stipend, or allowance, with all arrears thereof (if any) accrued due before the date of such bond; and such bond or obligation shall be prepared and executed at the expense of the borough fund."

The compensation clauses as to officers are to be construed liberally. *Reg. v. Liverpool Corporation*, 3 Nev. & P. 280. *Rex v. Mayor of Bridgewater*, 1 id. 466; 6 Ad. & E. 347. The officer must be a chartered

III. Relative to the Officers connected with.

(A) *Before* 5 & 6 *Wm.* 4, *c.* 76.

(*a*) *As to Aldermen.*[1]

(*b*) „ *Articled Clerks being Burgesses.*[2]

(*c*) „ *Sheriffs.*[3]

(*d*) *Of Removing Officers.*[4]

(B) *Since the* 5 & 6 *Wm.* 4, *c.* 76.

(*a*) *As to the Crier.*[5]

(*b*) „ *the Sheriffs.*[6]

(C) *As to the Election.*

(*a*) *Before* 5 & 6 *Wm.* 4, *c.* 76.

(1) *Of the Candidate.*[7]

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officer. *Ex-parte Harvey*, 3 Nev. & P. 159; 7 Ad. & E. 739. And a borough officer. *Reg. v. Mayor of Poole*, 3 Nev. & P. 119; 7 Ad. & E. 730. The clerk to the borough justices is entitled to compensation. *Reg. v. Mayor of Carmarthen*, 3 Per. & D. 35; 11 Ad. & E. 9. So is an attorney practising in a court confined to a limited number. *Reg. v. Mayor of York*, 8 Dowl. P. C. 502. So, a corporate officer only in office *de facto* is still entitled to compensation. *Reg. v. Corporation of Cambridge*, 4 Per. & D. 294. But where, after the 5 & 6 Wm. 4, a town-clerk was re-appointed, he refused to accept the office:—*Held*, that the Lords of the Treasury were right in refusing compensation. *Reg. v. Lords of the Treasury*, 2 Per. & D. 498; 10 Ad. & E. 179. And so, if a party voluntarily resigns his office. 8 Clark & Fin. 409. Where the Treasury and council refuse compensation, a *mandamus* will not be granted. See *Ex-parte Lee*, 6 Ad. & E. 139.

Where the Lords of the Treasury decided a particular officer was entitled to compensation the court refused to interfere. *Rex v. Mayor of Bridgewater*, &c. 1 Nev. & P. 466. Or where the Lords of the Treasury decided a compensation, as if the office had been for life. *Reg. v. Norwich Corporation*, 8 Ad. & E. 633. The compensation given by the Lords of the Treasury is final. *Reg. v. Lords of the Treasury*, 2 Per. & D. 369. Though in a subsequent case it was held that the Lords of the Treasury have no right to inquire whether an officer was properly removed or not. *Reg. v. Corporation of Warwick*, 11 Ad. & E. 757; 3 Per. & D. 429. The objections should be made before the council. *Reg. v. Mayor of Swansea*, 11 Ad. & E. 66.

As to the persons entitled to compensation under sect. 66 of the Municipal Corporations Act, *see* further, *Reg. v. Mayor of Manchester*, 5 Q. B. 502. *Reg. v. Town-council of Manchester*, 9 id. 458. *Reg. v. Mayor of Sandwich*, 10 id. 563. *Reg. v. Mayor of Poole*, 1 id. 616. *Parr v. Attorney-General*, 8 Clark & Fin. 409. *Reg. v. Mayor of Warwick*, 8 Q. B. 926. *Reg. v. Mayor of Litchfield*, 19 L. J. Q. B. 337.

[1] The offices of alderman and common clerk are incompatible. *Rex v. Tizzard*, 9 B. & C. 418. *See* Grant, Corp. 416.

Where a charter directs that aldermen shall be justices of the peace within a borough and that the aldermen may appoint deputies, the latter cannot be justices of the peace. *Jones v. Williams*, 3 B. & C. 762; 5 D. & R. 654; 1 Car. & P. 459.

[2] An articled clerk is not an apprentice to a trade, so as to be admitted a free burgess. *Rex v. Mayor of Doncaster*, 7 B. & C. 630; 1 M. & R. 545.

[3] A custom to elect a sheriff who was a freeman of the corporation is good. *Rex v. Grout*, 1 B. & Adol. 104.

[4] If a meeting be held by adjournment a corporate officer may be removed without new notice to the burgesses. *Rex v. Harris*, 1 B. & Adol. 936.

[5] Where the crier is removed under 5 & 6 Wm. 4, justices may commit him if he refuses to give up the bell. *Bayliss v. Strickland*, 1 Scott, N. S. 540; 1 Man. & G. 591.

[6] 5 & 6 Wm. 4, c. 76, s. 61, enacts, "that in the city of Oxford, in the town of Berwick-upon-Tweed, and in the counties of the cities of Bristol, Canterbury, Chester, Coventry, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, and York, and in the counties of the towns of Carmarthen, Haverfordwest, Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and Southampton, the council shall, upon the first day of November in every year, appoint a fit person to execute the office of sheriff, with the like duties and powers as the sheriff, or the person filling the office of sheriff in the said towns and counties respectively, would have had if this act had not passed; and every person who, at the time of passing of this act, shall hold the office or execute the duties of sheriff in the said towns and counties respectively, shall continue to hold and execute the same until the first appointment of a sheriff therein under the provisions of this act, and no longer."

An officer of a corporation acted as sheriff before the 5 & 6 Wm. 4, being really no sheriff:—*Held*, that the right of such an officer did not supersede the right of the sheriff of the county. *Grainger v. Taunton*, 5 Dowl. 190; 3 Bing. N. S. 64.

[7] Generally, before an election, any one is

(2) *As to the Mode of Election.*[1]

REX v. BUMSTEAD, 2 B. & Adol. 699.

As the election must be in accordance with the charter, a bye-law extending the number of persons eligible is bad.

By charter, August, 1670, the patten-makers of London and Westminster, and within ten miles thereof, were made a corporation, having a master, two wardens, and twelve assistants, and the company were yearly to elect one of the two wardens to be master. There was a power to the master, wardens, and assistants to fill up any vacancy which might occur among the master and wardens by reason of death or removal between the annual days of election. By a bye-law made in 1673, and agreed to by the whole company, the master was from thenceforth to be elected by the master, wardens, and assistants, in a particular mode, not given by the charter, out of two or three meet and sufficient persons, by the master, wardens, and assistants, and selected by the master and wardens. In case of an equality of votes, the master was to have the casting vote. The election of master had continued under this bye-law clause to 1831, when the defendant was elected under it; he was not a warden at the time.

Per Cur. This bye-law cannot be maintained. This is not a case where the corporation at large have, by a bye-law, merely delegated the power of election which they possessed before to a select body; inasmuch as here, by the charter, the master is to be elected from particular persons—viz. the two wardens; but by the bye-law he may be elected from among other persons—viz. the master and assistants. If such a bye-law were good, the charter might be wholly defeated. We think, also, that that part of the bye-law which regulates the election is void, because the right to elect is thereby delegated to the select body, on condition that they elect in a certain mode, which is not directed or sanctioned by the charter. The select body, therefore, have not the power which was given by the charter to the corporation at large.

(3) *As to Invalid Elections.*[2]

(4) *Of the Admission.*[3]

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a candidate for whom a vote is asked; but the poll-books are the only evidence of who was a candidate at the election. *Combe v. Pitt*, 1 W. Black. 524; *see* 2 Burr. 1020.

[1] On an election of a corporate officer the notice need not specify the purpose for which the members (when a select body) are to attend. *Rex v. Pulsford*, 8 B. & C. 350.

A usage as to the elections of officers repugnant to the charter cannot be supported (*Rex v. Salway*, 9 B. & C. 424), though in a subsequent case it was held that the charter may be varied by usage. *Rex v. Goldsmith*, 4 B. & Adol. 835.

A charter that no mayor shall be re-elected within three years means the charter year, and not the calendar year. *Rex v. Sawyer*, 10 B. & C. 486.

By custom the jurors of a court-leet may elect the corporate officers. *Rex v. Duke of Beaufort*, 2 Nev. & M. 815; 5 B. & Adol. 442. And the right of election of officers may by a bye-law be limited to a select body. *Rex v. Westwood*, 4 B. & C. 781; 6 D. & R. 257. So a bye-law reducing the number of electors is good, but not narrowing the number of persons eligible to serve. *Rex v. Attwood*, 1 Nev. & M. 286; 4 B. & Adol. 481.

Where the election is to be by the burgesses, or the greater part of them, a majority is sufficient. *Rex v. Headley*, 7 B. & C. 496; 1 M. & R. 345.

Where the right of election is vested in the majority of a mayor, four jurats, and two bailiffs, it means a majority of the entire number, and therefore may be exercised if some be dead. *Rex v. Greet*, 8 B. & C. 363. But in a subsequent case it was held there must be a majority of each class. *Rex v. May*, 4 B. & Adol. 843.

If an oath of office is to be taken under charter, it must be taken again if the charter be continued by letters patent. *Rex v. Roberts*, 3 Nev. & M. 130.

[2] If a burgess be unduly elected an alderman, and ousted as such, he is not remitted to the character of burgess. *Rex v. Hughes*, 5 B. & C. 886; 8 D. & R. 708.

To a plea that an officer was elected according to the charter, the replication should be that he was "not duly elected." *Rex v. Hughes*, 4 B. & C. 368; 6 D. & R. 443.

There cannot be a denial of the day of election. *Rex v. Rolfe*, 4 B. & Adol. 840; 1 Nev. & M. 773.

[3] The town-clerk is not bound to allow more

(*b*) *Since the* 5 *&* 6 *Wm.* 4, *c.* 76.

(1) *Election of Aldermen.*[1] *See* vol. i. p. 273.

(2) „ *Councillors.*[2]

22 Vic. c. 35, s. 6. "At any election of councillors to be held for any

than one burgess at a time to inspect the voting papers (*Rex v. Arnold*, 6 Nev. & M. 152); and where a corporate officer is published duly elected, within the time for making such declaration, it is too late afterwards to controvert the election. *Reg. v. Borough of Leeds*, 11 Ad. & E. 512.

The mayor and aldermen of London may refuse to admit an alderman without assigning reasons. *Rex v. Mayor, &c. of London*, 3 B. & Adol. 255; S. C. 2 Nev. & M. 126; *contra*, 9 B. & C. 1; 4 M. & R. 36.

[1] Under the 5 & 6 Wm. 4, c. 76, an election of alderman by lists is good. *Reg. v. Brightwell*, 10 Ad. & E. 171; 2 Per. & D. 413. *See* now 7 Wm. 4, and 1 Vic. c. 78. After declaration, the assessor cannot declare others duly elected. *Rex v. Mayor of Winchester*, 2 Nev. & P. 274; 7 Ad. & E. 215.

Under the 5 & 6 Wm. 4, c. 76, the returning officer's duty is to return the candidate who has the actual majority. He cannot inquire into the votes. *Reg. v. Ledgard*, 3 Nev. & P. 513.

Where the omission of a councillor's name from the burgess roll compels a new election, a *quo warranto* must previously issue. *Reg. v. Ricketts*, 3 Nev. & P. 151.

Under the words of the 9 Geo. 4, c. 17, the oath may be made after admission. *Reg. v. Humphrey*, 10 Ad. & E. 335; 3 Nev. & P. 681.

[2] By the 28th section of the 5 & 6 Wm. 4, c. 76, no person is qualified to be elected a councillor during such time as he has any share or interest in any contract or employment with, by, or in behalf of the council: —*Held*, that a party who had entered into an existing contract for profit with the council was disqualified, although, by reason of its not being under seal, he could not have sued the corporation upon the contract. *Reg. v. Francis*, 21 L. J. Q. B. 304; 18 Q. B. 526.

It seems that a contract with the town-council acting as the local board of health in a corporate district operates as a disqualification. *Baker v. Marsh*, 4 E. & B. 144; 24 L. J. Q. B. 1.

The defendant and three other persons had contracted with the commissioners under a local act to sink an Artesian well, for the purpose of supplying the town with water. This contract and the works were afterwards assigned over to the commissioners by deed, who thereby released the contractors, and covenanted to pay them a certain sum, which had already been incurred, and a further sum of 850*l.* in case the commissioners should either abandon the works or complete them, and obtain a specified supply of water from the well. The contractors also covenanted with the commissioners for quiet enjoyment, and not to molest them in the completion of the works. All the powers and contracts of the commissioners were transferred to the council acting as the local board of health, by the Public Health Act:—*Held*, that this contract was "a security for the payment of money only," within the meaning of the 5 & 6 Wm. 4, c. 76, s. 28. *Baker v. Marsh, supra.*

A. who had contracted with the council of a borough acting as a local board of health, for the performance of certain public works in the borough, bought of the defendant, who was a tradesman, articles required in the course of these works:—*Held*, that this was not such a contract or employment as disqualified the defendant from holding a corporate office under the 5 & 6 Wm. 4, c. 76, s. 28. *Le Feuvre v. Lankester*, 3 E. & B. 530; 23 L. J. Q. B. 254.

The qualification for councillor of being rated to the poor upon an annual value of not less than 15*l.*, refers to the sum inserted in the rate-book as "rateable value," and not as "gross estimated rental." *Baker v. Marsh, supra.*

At an election for two councillors of a borough on the 1st of November, 1851, A. B. and C. were candidates. A. and B. had the greatest number of votes, and were returned as elected, but B. was disqualified, and the voters had notice of his disqualification. In July, 1852, judgment of ouster was signed in a *quo warranto* filed against B. On the 26th of October, 1852, C., by a notice, required the council to admit him as a councillor, and to administer to him the declaration required by the 5 & 6 Wm. 4, c. 76, s. 50. On the 8th of November, 1852, C. made the declaration, and on the 9th of November voted at the election for mayor, when his vote was rejected:—*Held*, that C. was elected on the 1st of November, 1851, and ought to have been returned, and that, having made the declaration before the 9th November, 1852, he was entitled to vote at the election of mayor. *Reg. v. Coaks*, 3 E. & B. 249; 23 L. J. Q. B. 133; *see* 2 Burr. 1020.

The aldermen or councillors may refuse to administer the declaration if satisfied that the party elected is disqualified. *Reg. v. Green*, 2 Q. B. 460.

It is a universal rule that a returning officer at an election cannot return himself. If, therefore, the mayor who presides at the annual election of town councillors is chosen one of the council, it is a void election. *Reg. v. Owens*, 23 Jur. 764; 28 L. J. Q. B. 316.

In order to render a person liable for not accepting a corporate office under the 5 & 6 Wm. 4, c. 76, s. 51, he must have notice of his election; which must be either by actual presence at the election, or by receiving official notification of his having been elected. *Reg. v. Pierce*, 5 Q. B. 94.

borough or ward, any person entitled to vote[1] may nominate for the office of councillor himself (if duly qualified), or any other person or persons so qualified, not exceeding the number of persons to be elected for the borough or ward, as the case may be, and every such nomination shall be in writing,[2] and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the persons nominating, and sent to the town-clerk at least two whole days (Sunday excluded) before the day of election; and the town-clerk shall, at least one whole day (Sunday excluded) before the said day of election, cause the Christian names and surnames of the persons so nominated, with such statement of their respective places of abode and descriptions, and with the names of the party nominating them, respectively, to be printed and placed on the door of the town-hall, and in some other conspicuous parts of the borough or ward for which such election is to be held." *See* also 5 & 6 Wm. 4, c. 76, s. 32. As to when a town councillor resigns, *see* 3 L. T. (N. S.)

(3) *Limitation of Time for Objecting to Election.*

Title of alderman or councillor must be questioned within twelve months of his election.

6 & 7 Vic. c. 89, s. 1. "No election of any mayor of any of the boroughs named in schedules A. & B. of the 5 and 6 Wm. 4, c. 76, or in any borough to which a charter of incorporation may have been or may hereafter be granted under the provisions of that act, and of the 1 Vic. c. 78, or either of them, which has already taken place, or shall hereafter take place, shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor, to which he may have been previously elected, unless application shall have been made to the court of Queen's Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor within twelve months after such his election to the said office of alderman or councillor; and that from and after the passing of this act, every election heretofore made, or hereafter to be made, to the office of mayor, alderman, councillor, or any other corporate office[3] in any of the boroughs aforesaid, which shall not be or have been called in question by such application

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[1] A burgess is not disqualified by the non-payment of an illegal rate. *Reg. v. Mayor of New Windsor*, 7 Q. B. 948.

By the 13 & 14 Vic. c. 77, the occupiers of small tenements are exempted from rates; but by s. 7, when the owner is rated, the occupier is to be entitled to all the privileges under the Municipal Corporations Act to which he would have been entitled if he had been rated.

[2] Where an election takes place to supply extraordinary as well as ordinary vacancies, the notices, voting papers, &c., must be distinct. *R. v. Rowley*, 3 Q. B. 143; in error, 6 Q. B. 668.

Where a minority of the town council present delivered voting papers to the mayor for the election of certain persons as aldermen, and the mayor, acting under a mistaken notion that the day was not one on which the election could take place (an opinion entertained by the majority of the town-council), refused to receive the voting papers, it was held that this was no election, the act of the minority not being the act of the town-council. *Reg. v. Bradford*, 20 L. J. Q. B. 226.

The omission to elect an assessor for the borough is no bar to an election of assessors to revise the burgess lists with the mayor. *Reg. v. Mayor of Weymouth*, 7 Q. B. 46.

A voting paper commencing "I, the undersigned, A. B.," but containing no signature at the bottom, but only the voter's qualification, is bad. *Reg. v. Tart*, 28 L. J. Q. B. 173.

Signature by the burgess voting of his surname, and the initial letter of his Christian name, is a sufficient signature of the voting paper. *Reg. v. Avery*, 18 Q. B. 576; 21 L. J. Q. B. 428. But the name must appear and be connected with the qualification stated. E. & E. 618; *see* 30 L. J. Q. B. 180; 7 Jur. 757.

Where the voting paper described the property in respect of which a burgess voted as "Pilton Street," and he was described in the burgess-roll as "of Pilton," and his qualifying property, "house in the street:" it appeared that Pilton consisted of only one main street, which was called Pilton Street, or "the street" indiscriminately: the court held that the voting paper was sufficient. *Reg. v. Gregory*, 1 E. & B. 600; 22 L. J. Q. B. 120.

The words "place of abode" in the above section, mean "place of residence;" voting papers, therefore, describing the candidate as of his place of business only, are void. *Reg. v. Hammond*, 17 Q. B. 772; 21 L. J. Q. B. 153.

[3] This means officers of the governing part of the corporation, and does not include a burgess or coroner. *Reg. v. Milner*, 5 Q. B. 589. *Reg. v. Grimshaw*, 16 L. J. Q. B. 585.

to the court of Queen's Bench within twelve calendar months from such election, shall be deemed to have been, to all intents and purposes, a good and valid election."

(4) Mandamus *or* Quo Warranto[1] *connected with Election.*

If notice be given before application for the *mandamus* or *quo warranto*, cause may be shown in the first instance.

6 & 7 Vic. c. 89, s. 5. "Whereas it is expedient to render certain proceedings by way of *quo warranto* and *mandamus*, so far as they affect corporate officers in boroughs, more summary and expeditious: Be it therefore enacted, that from and after the passing of this act, in all cases of intended application to the court of Queen's Bench either for a *mandamus* to proceed to an election of any corporate officer or officers in any of the aforesaid boroughs, or for an information in the nature of a *quo warranto* against any person claiming to be a corporate officer of and in any of the said boroughs, it shall be lawful for the party intending to make such application to give notice in writing thereof to the party to be affected thereby, at any time not less than ten days before the day in the said notice specified for making such application, in which notice shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavit whereby application will be supported, and thereupon it shall be lawful for the last-mentioned party to show cause in the first instance against such application, and if no sufficient cause be shown, it shall be lawful for the court of Queen's Bench, on proof of the due service of such notice and statement, and of the delivery of a copy of such affidavits as may be used for the purpose of supporting such application, to make the rule for such *mandamus* or information absolute, if the said court shall so think fit, in the first instance; and also, if they shall so think fit to direct, that any writ of *mandamus* thereby ordered to be issued shall be peremptory in the first instance; and also, that the venue in any information thereby ordered shall be laid in the county of Middlesex, or in the city of London, and that the issue or issues of fact thereon, if any, shall be tried at the sittings at *nisi prius* of the said court at Westminster, or in London, by a jury of the same county or city respectively."

IV. Relative to the Duties of.

(A) *Before 5 & 6 Wm. 4, c. 76.*

(*a*) *A Resolution by a Corporation not under Seal is not binding.*

Dunstan v. Imperial Gas Company, 3 M. & Adol. 125.

A resolution by a corporation not under seal is not binding.[2]

This was an action of debt to recover from the defendants certain fees due to the plaintiff, as one of the directors of the company, for his labour, care, diligence, and attendance, in attending divers weekly and other courts, committees, &c. By the 1 & 2 Geo. 4, c. 117 (local and personal act), the defendants were created a corporation, with all the rights and privileges of such. By the 52d section certain persons are to be appointed to transact the business of the company; amongst others, eighteen directors, three auditors, and a clerk. Persons are not qualified to be directors unless they have a certain number of shares. The auditors likewise are to have a certain number. To be clerk requires no qualification. By the 76th section the company have power to make

[1] Where a party had entered into a continuing contract with the council, the court held that the disqualification continued during the existence of the contract, and that a *quo warranto* might be applied for notwithstanding more than twelve months had elapsed from the time of the election, or from the time when the disqualification first attached. *Regina v. Thwaites*, 1 E. & B. 704; 22 L. J. Q. B. 238. On applying for a *quo warranto*, the disqualification of the party elected must be distinctly sworn to. 7 Jur. 262; 3 L. T. (N. S.) 667. On the trial of a *quo warranto*, the whole case should be opened in the first instance. 3 L. T. (N.S.) 353.

[2] *Ante*, p. 263. A corporation aggregate cannot appear in person, but must appear by attorney. *Reg. v. Birmingham & Gloucester Railway Co.* 9 C. & P. 469.

Under the 5 & 6 Wm. 4, the corporate funds can only be applied to the payment of the interest chargeable on the corporate property. *Hopkins v. Corporation of Swansea*, 4 Mee. & W. 640.

bye-laws. By the 60th section the court of proprietors are to make rules and regulations. The court of proprietors, at a general meeting, on the 15th of August, 1822, made a resolution containing, amongst other things, the following:—"Resolved, that there be allowed to every director, for every attendance at the court of directors, two guineas," &c.

Per Cur. The act appoints a certain number of directors, and some of the duties to be performed by them are pointed out by the act; and the powers given to them are as unlike powers given to servants as possible. The act is silent as to remuneration; and we do not see how, in point of law, they can be entitled to any, except it be given to them by a bye-law, or contract of the whole corporation, under their common seal. The resolution in question was not made under the common seal of the corporation; and we are of opinion that the directors cannot by law claim the compensation voted to them by that resolution.

(B) *Since* 5 *&* 6 *Wm.* 4, *c.* 76.[1]

V. Relative to the Privileges of, since 5 & 6 Wm. 4, c. 76.[2]

VI. „ Rights and Liabilities of.[3]

[1] The minutes of the proceedings of the council must be signed by the chairman at the time.

By 5 & 6 Wm. 4, c. 74, s. 69, it is enacted, "that all acts whatsoever authorised or required by virtue of this act to be done by the council of such borough, and all questions of adjournment or others that may come before such council, may be done and decided by the majority of the members of the council who shall be present at any meeting held in pursuance of this act, the whole number present at such meeting not being less than one-third part of the number of the whole council; and at all such meetings the mayor, if present, shall preside; and the mayor, or in the absence of the mayor, such alderman, or in the absence of all the aldermen, such councillor, as the members of the council then assembled shall choose to be the chairman of that meeting, shall have a second or casting vote, in all cases of equality of votes; and minutes of the proceedings of all such meetings shall be drawn up and fairly entered into a book to be kept for that purpose, and shall be signed by the mayor, alderman, or councillor, presiding at such meeting." In a case where the chairman had taken away the notes or minutes of the business down to his own house, and, having revised them, had caused a fair copy to be delivered to the town-clerk on the day after the meeting, the court held that these minutes should be entered at the meeting, and signed by the chairman at that time. *Mr. Justice Patteson* observed, "that perhaps, if the town-clerk had drawn up the minutes and had them signed after the meeting, we might not say that the thing was incorrect when so done." See *Reg. v. Mayor of Evesham*, 8 Ad. & E. 266; 3 Nev. & P. 351.

"A quarterly meeting may be adjourned to complete unfinished business, and in such cases no fresh notice is necessary; but no fresh business which may casually arise can be transacted at the adjourned meeting unless notice and summons have been issued, as required by sect. 69." *Per Coleridge, J.: Reg. v. Grimshaw*, 10 Q. B. 755.

When the power of trustees under a local act have been transferred to the body corporate of a borough, under the 6 & 7 Wm. 4, c. 76, s. 75, the procedure must be in conformity with that pointed out in sect. 69, and not to that pointed out in the local act. A notice of meeting, such as is thereby directed for the ordinary meetings of the town-council, is sufficient to enable them to exercise the powers of the local act. *Town-Council of Kidderminster v. Court*, 28 L. J. M. C. 148.

[2] *Primâ facie*, a municipal corporation has power to dispose of all its property like a private person (29 Beav. 244); but individual corporators have no estate, either legal or equitable, in the lands. 1 K. & G. 334; 29 Beav. 144; 30 L. J. Ch. 165. The privileges of the persons described in the 5 & 6 Wm. 4, c. 76, as to the administration of charity estates, ceased after 1st August, 1836.

[3] Where, the corporation having a prescriptive right to tolls, by a charter of Elizabeth all the ancient rights were confirmed, but exempting the inhabitants from toll in all places except London:—*Held*, that as such exemption led to no inference that the inhabitants were to be exempted from necessary charges of their own town, to which the tolls were applicable, the exemption therefrom applied to the tolls of all other places (except London), but not to the tolls of their own town. *Rex v. Mayor of Truro*, 8 Bing. 275; S. C. 6 M. & P. 270; abridged, *post*, Tolls.

The corporation of the Trinity House of Hull had power to license pilots, but only occasionally exercised that power to the full extent:—*Held*, that it did not affect their right when it became necessary. *Beilby v. Raper*, 3 B. & Adol. 284.

The managing directors of a trading corporation may, by deed under seal, grant a pension to a retiring servant. *Clarke v. The Imperial Gas Co.* 1 Nev. & M. 206; 4 B. & Adol. 315.

And the clerk of a corporation may distrain without an authority under seal, unless

RIGHTS AND LIABILITIES OF.[1]

(A) *In General, before* 5 & 6 *Wm.* 4, *c.* 76.

(B) *To make Bye-laws.*

(*a*) *Before* 5 & 6 *Wm.* 4, *c.* 76.

(1) *The Power to make Bye-laws does not sanction Bye-laws in Restraint of Trade.*

CLARK v. LE CREN, 9 B. & C. 52.

The power to make bye-laws does not sanction bye-laws in restraint of trade.[2]

The Painters' Company in London made the following bye-law:—"That from and after the 29th of September, 1767, every person not being already free of the city, who should exercise the art, trade, or mystery of painter within the city of London, or liberties thereof, should be made free of the said company; and that no person then exercising, or who should thereafter exercise the said art or trade within the city or liberties, should, after the 29th of September, 1767, be admitted by the chamberlain into the freedom of the said city, of or in any other company than the said company, any law, usage, or custom of that city to the contrary thereof notwithstanding: Provided always, that all and every person or persons, not being already free of the said city, and who then were, or thereafter should be entitled to the freedom of any other company within the city, by patrimony or service, and ought, in pursuance of the said act, to be made free of the said company of painters, should be admitted into the freedom of the said company, upon payment of such and the like fine and fees, and no more, as were then usually paid and payable upon the admission of the child or apprentice of a freeman of the same company."

Per Cur. By the common law, any person may carry on any trade in any place, unless there be a custom to the contrary; and if there be such a custom, then a bye-law in restraint of trade warranted by such custom will be good; but if there be no such custom, a bye-law in restraint of trade will be bad. The

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the statute of incorporation enacts that the warrant of distress shall be by deed. *Smith v. Birmingham Gas Co.* 3 Nev. & M. 771; 1 Ad. & E. 526.

[1] If the mayor of a town order weights and measures, and when supplied they be examined at a full meeting of the corporation, this is such a recognition of the contract as will make the corporation liable to pay for them, although the order for them was not under the common seal of the corporation; and the fact that the mayor was afterwards ousted from his office by a judgment from the court of Queen's Bench makes no difference. *De Grave v. Corporation of Monmouth*, 4 C. & P. 111. The town council may appoint inspectors of weights and measures. 24 & 25 Vic. c. 75, s. 6.

[2] See *Chamberlain of London v. Compton*, 7 D. & R. 597. The mayor and aldermen of London may limit the number of carts working for hire to be used in the city of London. *Shaw v. Pope*, 2 B. & Adol. 465. A bye-law that "out of such corporate funds as may be thought fit," or by fine, the steward was to provide a dinner for certain members at a stated time, is bad. *Carter v. Sanderson*, 5 Bing. 79; 2 M. & P. 164. As to the power of railway companies to make bye-laws, *see ante*, p. 49. A bye-law declaring a bankrupt or insolvent as disqualified is valid. 30 L. J. Q. B. 186. How to be construed generally, 16 id.; and 3 L. T. (N. S.) 669.

A bye-law imposing a fine for not taking corporate offices is valid, if the charter authorises such penalties. *Graves v. Colby*, 1 Per. & D. 235.

A corporate body becoming possessed of land by enclosure may make bye-laws regulating the rents and appropriation thereof. *Hopkins v. Corporation of Swansea*, 4 Mee. & W. 621.

The Mercers' Company was one of the ancient guilds of the city of London, and by a charter of 17 Ric. 2, the commonalty of the company were empowered to elect annually four wardens out of the commonalty. From 1391 to 1463 the practice was for the out-going wardens to appoint their successors. Since 1463 a select body had existed under the name of the Court of Assistants, who held their offices for life, and supplied vacancies in their own body by self-election out of the whole commonalty. The Court of Assistants had, since 1463, always elected the wardens from the commonalty of the company, and of late years exclusively from amongst the members of their own court. No instance was to be found of wardens having ever been elected by the commonalty at large. The court held that this usage was sufficient to warrant the inference of a bye-law delegating to the Court of Assistants the power of electing wardens, and that such a bye-law was valid notwithstanding that it limited the right of election to a select and self-elected portion of the whole body. *Reg. v. Powell*, 3 E. & B. 377; 23 L. J. Q. B. 199.

effect of the bye-law in question is to prevent persons from carrying on trade; it operates, therefore, not merely to regulate, but to restrain trade. And, inasmuch as it does not appear that there is any special custom to warrant such a bye-law, it is void.

(*b*) *Since 5 & 6 Wm. 4, c. 76.*[1]

(1) *Power of Municipal Corporations to make Bye-Laws.*

Power of municipal corporations to make bye-laws.

By 5 & 6 Wm. 4, c. 76, s. 90, it is enacted, "that it shall be lawful for the council of any borough to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force throughout such borough, and to appoint by such bye-laws such fines as they shall deem necessary for the prevention and suppression of such offences: Provided that no fine so to be appointed shall exceed the sum of 5*l.* and that no such bye-law shall be made unless at least two-thirds of the whole number of the council shall be present: Provided that no such bye-law shall be of any force until the expiration of forty days after the same, or a copy thereof shall have been sent, sealed with the seal of the said borough, to one of his Majesty's principal secretaries of state, and shall have been affixed on the outer door of the town-hall, or in some other public place within such borough; and if at any time within the said period of forty days his Majesty, with the advice of his privy council, shall disallow the same bye-law, or any part thereof, such bye-law, or the part thereof disallowed, shall not come into operation: Provided also, that it shall be lawful for his Majesty, if he shall think fit, at any time within the said period of forty days, to enlarge the time within which such bye-law, if disallowed, shall not come into force; and no such bye-law shall in that case come into force until after the expiration of such enlarged time."

By sect. 91 it is enacted, "that all the provisions hereinafter contained relative to offences against this act punishable upon summary conviction shall be taken to apply to all offences committed in breach of any bye-law or regulation made by virtue of this act."

VII. Relative to Customs Connected with.[2]

VIII. „ „ the Jurisdiction of Justices under 5 & 6 Wm. 4, c. 76.

By 5 & 6 Wm. 4, c. 75, s. 60, if any officer therein mentioned shall refuse to account, "then and in every such case, upon complaint made on behalf of the said council by such person as they shall authorise for that purpose of any such refusal or wilful neglect as aforesaid to any justice of the peace for the county or other jurisdiction wherein such officer so refusing or neglecting shall be or reside, such justice is hereby authorised and required to issue a warrant under his hand and seal for bringing such officer before any two justices of the peace for such county or jurisdiction; and upon the said officer appearing or not being found it shall be lawful for such justices to hear and determine the matter in a summary way."[3]

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[1] An omission in a bye-law may be supplied by implication from the subject-matter of the bye-laws. *Poulterers' Co. v. Phillips*, 7 Bing. N. S. 314.

[2] All burgesses of corporate meetings ought to be summoned: a custom that the omission accidentally to summon one or two should not vitiate the meeting, is bad in law. *Rex v. Lanyhorne*, 6 Nev. & M. 203; 4 Ad. & E. 538.

A custom in a corporate company, that all persons exercising their trade shall become members of that corporate body, seems binding. *Mercers' Co. of Shrewsbury v. Hart*, 1 C. & P. 113.

[3] By 7 Wm. 4 & 1 Vic. c. 78, it is enacted, "that all matters cognisable by virtue of any local act of parliament, or otherwise, by any justice of the peace, or by the general quarter sessions of the peace having jurisdiction within any place which since the passing of the said act for regulating corporations, or of an act passed in the sixth and seventh year of the reign of his present

IX. Relative to the Courts within the 5 & 6 Wm. 4, c. 76.[1]

X. „ „ Burgess-Roll.

The overseers of the poor are annually to prepare a list of the burgesses.

5 & 6 Wm. 4, c. 76, s. 15. "On the fifth day of September in every year the overseers of the poor of every parish wholly or in part within any borough, shall make out an alphabetical list, to be called 'The Burgess List,' according to the form No. 1 in the schedule D to this act annexed, of all persons who shall be entitled to be enrolled in the burgess-roll of that year, according to the provisions of this act in respect of property within such parish, and the overseers shall sign such burgess-lists, and shall deliver the same to the town-clerk of the borough on the fifth day of September in every year."[2]

XI. Relative to the Borough-Rate under the 5 & 6 Wm. 4, c. 76.[3]

Majesty, intituled 'An Act to make temporary provision for the Boundaries of certain Boroughs,' has ceased, or which under any future act may cease to be within and to be part of any borough, or the liberties thereof, shall be cognisable by the justices of the peace, or the general quarter sessions of the county, riding, or division, liberty, or jurisdiction, within which such place is situate, in the same manner, and subject to the same provisions, as if the same were within the jurisdiction of the justices of the peace for that borough or place, or of the general or quarter sessions of the same."

The jurisdiction of county justices over corporate officers exists under the 5 & 6 Wm. 4, c. 76, ss. 60, 65, though the corporate town has its own justices. *In Re Gateshead Justices*, 6 Ad. & E. 55.

[1] By s. 1, 24 & 25 Vic. c. 75, the mayor shall have precedence over all justices in and for the borough. *See* 6 Jur. N. S. 1094; 30 L. J. Q. B. 2. A justice shall be deemed to reside within if he occupies any house, warehouse, or other premises. 24 & 25 Vic. c. 75, s. 3. As to clerk to justices, *see* s. 5; *see* E. & E. 729. Under the 43d section of the 5 & 6 Wm. 4, c. 76, where a borough is divided into wards, and an assessor appointed for each ward, he and the mayor constitute the court to revise the burgess-list. *Reg. v. Parry*, 6 Ad. & E. 840; 2 Nev. & P. 414. The Bristol Court of Requests has been held to be within the power of the statute 6 & 7 Wm. 4, c. 105, s. 8. *Palmer v. Powell*, 6 Mee. & W. 627.

[2] It was held under the above section, each of the overseers and churchwardens was bound to make out, sign, and deliver the burgess-list of the parish (*Clarke v. Gant*, 8 Ex. 252; 22 L. J. Ex. 67); but now, by 16 & 17 Vic. c. 79, s. 14, it will be sufficient if done by a majority.

An overseer of a parish within a borough is liable to a penalty of 50*l.* under the 5 & 6 Wm. 4, c. 76, s. 48, in case of his default in making out, signing, and delivering the burgess-list on or before the 1st of September in any year, in accordance with the 20 & 21 Vic. c. 50, s. 7, notwithstanding such list may be made out and signed and delivered by him before the 5th of the month. *Hunt v. Hibbs*, 5 H. & N. 123; 29 L. J. Ex. 222.

The 5 & 6 Wm. 4, 76, s. 28, disqualifies persons who are not entitled to be on the burgess-roll from being chosen mayor or councillor. This, however, is not conclusively determined by the burgess-roll, for if entitled to be there under the 9th section, a person incurs no penalties for acting as mayor or councillor, although his name may have been expunged upon the revision of the lists. *Reg. v. Dixon*, 19 L. J. Q. B. 363. *Whalley v. Bramwell*, 15 Q. B. 775; 20 L. J. Q. B. 53.

A rate for the time being, upon which, under s. 11, the occupier is to be rated, is the rate completed by allowance and publication. *Bushell v. Luckett*, 2 C. B. 111.

A notice of claim to be on the burgess-roll, under s. 17, should state the parish in which the property is situated, in respect of which the claim is made. *Reg. v. Kidderminster*, 20 L. J. Q. B. 281; 2 L. M. & P. 201.

If the burgess-lists be defective and null, and the mayor and assessors decline to revise them, they are not bound to revise the list of claimants who claim to be inserted in the burgess-lists. *In Re the Mayor & Assessors of Harwich*, 21 L. J. Q. B. 193.

Where the claimant signed his notice of claim with the initial of his Christian name and his surname in full, and mayor and assessors had information from the overseer as to his Christian name, the court held that they were not warranted in rejecting his claim on the ground that it was not signed in full. *Reg. v. Mayor of Hartlepool*, 21 L. J. Q. B. 71; 2 L. M. & P. 666.

The right to inspection will not be enforced by *mandamus* if the applicant has already been furnished substantially with what he is entitled to by statute: as, where the town-clerk had at his own request given him a copy of the burgess-roll. *Reg. v. Blagge*, 10 Jur. 983.

[3] By 5 & 6 Wm. 4, c. 76, s. 92, it is enacted, "that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all monies due, chattels and valuable securities, belonging or payable to any body corporate named in conjunction with the said borough in the said schedules (A and B), or to any member or officer thereof, in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has been already provided for), shall be paid to the treasurer of such borough; and all the monies which he shall so receive shall be carried by him to the account of a fund, to be called 'The Borough Fund;' and such fund, subject to the payment of any lawful

debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required, or shall deem it expedient, to redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate, by virtue of any proceedings, either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payment of the salary of the mayor, and of the recorder and of the police magistrate hereinafter mentioned, when there is a recorder or police magistrate, and of the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, and also toward the payment of the expenses incurred from time to time in preparing and printing burgess-lists, ward-lists, and notices, and in other matters attending such elections as are herein mentioned, and in boroughs which shall have a separate court of sessions of the peace, as is hereinafter provided, toward the expenses of the prosecution, maintenance, and punishment of offenders, and toward such other sum to be paid by such borough to the treasurer of such county as is hereinafter provided, and toward the expense of maintaining the borough gaol, house of correction, and corporate buildings, and towards the payment of the constables, and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the benefit of the inhabitants and improvement of the borough: Provided that it shall not be lawful for the council to be elected under the provisions of this act in any borough in which the body corporate named in conjunction with the said borough, in the said schedules (A and B), before the time of the passing of this act, shall have contracted any lawful debt chargeable on any tolls or dues belonging or payable to the said body corporate, or to any member or officer thereof in his corporate capacity, or toward the satisfaction whereof such tolls or dues, or any part thereof, were applicable before the passing of this act, to alter or reduce the amount to be levied and payable of such tolls or dues, or to grant for any consideration any remission of, or exemption from, such tolls or dues, or any part thereof, unless with the consent in writing under the hands of a majority in number and amount of the creditors to whom such debt is due, until after such debt, and all arrears of interest due thereon, shall have been fully paid and satisfied; and in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorised and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and, in order to raise the amount so estimated, the said council is hereby authorised and required, from time to time, to order a borough rate, in the nature of a county rate, to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace, assembled at their general or quarter sessions, in any county in England, have within the limits of their commission, by virtue of an act made in the fifty-fifth year of his late Majesty King George the Third, intituled 'An act to amend an act of his late Majesty King George the Second, for the more easy assessing, collecting, and levying of county rates,' or as near thereto as the nature of the case will admit, except as hereinafter excepted; and all warrants required by the said act to be issued under the hands and seals of two or more justices, shall in like case be signed by the mayor, and sealed with the seal of the borough: provided that such council shall not be empowered to receive, hear, or determine any appeal against any such rate; and if any person shall think himself aggrieved by any such rate, it shall be lawful for him to appeal to the recorder hereinafter mentioned at the next quarter sessions for the borough in which such rate has been made, or in case there shall be no recorder within such borough, to the justices at the next court of quarter sessions for the county within which such borough is situate, or whereunto it is adjacent; and such recorder or justices respectively shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate; and all such sums levied in pursuance of such borough rate shall be paid over to the account of the borough fund, and, subject to the provisions hereinbefore contained, shall be applied to all purposes to which, before the passing of this act, a borough rate or county rate was applicable in such borough or county: Provided that, in every case in which, before the passing of this act, any rate might be levied in any borough, or in any parish or place made part of any borough under the provisions of this act, for the purpose of watching solely by day or by night, or for the purpose of watching by day or by night conjointly with any other purpose, it shall be lawful for the council of such borough to levy a watch rate sufficient to raise any sum not greater than the average yearly sum which, during the last seven years, or when such rate shall not have been levied during seven years, then during such less number of years as such rate shall have been levied, shall have been expended in the mainte-

nance and establishment of watchmen, constables, patrol, or policemen within the district in which such rate was levied, and for that purpose the council shall have all the powers hereinbefore given to the council in the matter of the borough rate; and where any part of any borough shall not, at the time of the passing of this act, be within the provisions of the act authorising the levy of such rate for watching as aforesaid, it shall be lawful for the council, from time to time, to order that such part, or so much thereof as to the council shall seem fit, shall be rated to the watch rate in like manner as other parts of the borough to be specified in such order, and such watch rate thereupon shall be levied within the part mentioned in such order in like manner as in the other parts of the borough so specified, and all such sums levied in pursuance of such watch rate shall be paid over to the account of the borough fund: Provided always, that no such order as last aforesaid shall be made for rating to such watch rate any part of any borough in which, at the time of passing this act, such rate as aforesaid shall not be levied, and which is more than two hundred yards distant from any street or continuous line of houses, which shall be regularly watched within the borough under the provisions of this act: Provided also, that nothing in this act contained shall be construed to render liable to the payment of any debt contracted, before the passing of this act, by any body corporate, any part of the real or personal estate of the said body corporate, which, before the passing of this act, was not liable thereto, or to authorise the levy of any rate within any part of any borough for the purpose of paying any debt contracted before the passing of this act, which, before the passing of this act, could not lawfully be levied therein towards the payment of the same."

By the 17 & 18 Vic. c. 71, justices in boroughs not within the provisions of the Municipal Corporations Act are empowered to make borough rates. Legal expenses are chargeable on the borough funds. 9 C. B. (N. S.) 401; 30 L. J. C. P. 169.

It is not necessary that a borough rate should be made in public. If the rate be good on the face of it, no advantage can be taken of the objection that it was retrospective in an action of replevin for goods seized under the warrant of justices as a distress for such rate. *Jones v. Johnson*, 20 L. J. M. C. 11.

An order of the town-council to "collect, levy, and pay," was held to authorise parish and special overseers to levy by means of rates. *Cobb v. Allen*, 10 Q. B. 683. The overseer cannot make a larger rate than that specified in the order of the council. *Reg. v. Mayor of New Windsor*, 7 Q. B. 908.

The borough council made an order, which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor rates made and collected, and they also issued a warrant to their treasurer, commanding him, within one hundred days from the date thereof, to demand from the overseers the said proportions. The treasurer delivered his precept to the overseers, requiring them, within one hundred days after the receipt thereof, to pay the proportions out of the poor rates made and collected or to be made and collected. The plaintiff, an overseer, not having paid the proportions assessed on his parish, a warrant was issued by the defendants, being the mayor and justices of Lichfield, commencing thus: "Borough and City of Lichfield." The warrant then directed certain parties to levy the sum of 77*l.* 16*s.* 1½*d.* by distress of the plaintiff's goods, and provided that "if, within the space of five days next after such distress by you taken, the sum of 77*l.* 16*s.* 1½*d.* shall not be paid, that then you do sell the said goods. Given under our hand and seal, and under the corporate seal of the said borough and city. T. T. (L. S.), L. B. M. (L. S.), justices of the said borough and city. [*Corporation seal.*] Thomas Johnson, mayor." The defendant Johnson was not stated in the body of the warrant to be the mayor of the borough. The court held that it sufficiently appeared that the warrant of distress was made within the jurisdiction of the mayor and justices, and that one of the defendants was mayor of the borough at the time it was made. *Jones v. Johnson*, 20 L. J. M. C. 11.

As to the collection of borough rates for parts of parishes and places within boroughs, *see* 8 & 9 Vic. c. 110.

By the 13 & 14 Vic. c. 42, s. 3, it is enacted, that "when any charter of incorporation shall hereafter be granted by her Majesty to any town or borough in England or Wales, in pursuance of the provisions of 5 & 6 Wm. 4, c. 76, or of any act or acts which may have been or shall be passed to amend the same, it shall be lawful for the council of such town or borough to pay the costs of and in relation to such charter of incorporation, and of and in relation to all elections, acts, and proceedings under the same, out of any borough rate or borough rates to be made for any such town or borough." See *R. v. Oswestry*, 12 Q. B. 237.

An officer appointed by the council, with a salary, cannot maintain an action of debt against the corporation for arrears of such salary; his remedy is against the borough fund. *Addison v. Mayor, &c. of Preston*, 12 C. B. 108; 21 L. J. C. P. 146.

Courts of equity regard the borough fund as trust property, and will therefore entertain jurisdiction with a view to insure its proper application. See *Attorney-General v. Corporation of Lichfield*, 11 Beav. 120. *Attorney-General v. Corporation of Norwich*, 16 Sim. 225. *Attorney-General v. Andrews*, 2 M'N. & G. 225. *See* further, as to the application of the borough funds, *Reg. v. Mayor of Warwick*, 8 Q. B. 326. *Reg. v. Mayor of Leeds*, 4 id. 796. *Reg. v. Thomson*, 5 id. 477. *Reg. v. Mayor of Gloucester*, 5 id. 862. *Reg. v. Litchfield*, 10 id. 534; 16 L. J. Q. B. 333.

On an appeal against a rate, the notice

(A) *The 92d section only sanctions Prospective and not Retrospective Rates.*

WOODS v. REED, 2 Mee. & W. 777.

On the question as to the validity of a retrospective rate made under the 92d sect. of the 5 & 6 Wm. 4, c. 76,— The 92nd section only sanctions prospective and not retrospective rates.

Per Cur. We think the act intended the rate to be prospective and not retrospective. It could never be the intention to give the council the power first to incur expenses and then make a rate to meet them. But they are first to estimate the expense and then levy a rate. This mode is much more likely to make a council economical than if they first incurred the debt and then provided the means to satisfy it. Out of the borough fund the respective salaries of the town-clerk and treasurer, and of every other officer whom the council shall appoint, are to be paid; so that, unless the rate is prospective, the council may impose the cost of heavy salaries on the borough, and leave to their successors the odium of levying the money to pay them. It seems to us, therefore, not only that the legislature have said that the rates shall not be retrospective, but have said so wisely. *See ante*, p. 284, n.

XII. RELATIVE TO THE REMEDIES CONNECTED WITH.

(A) *Actions by.*[1]

MAYOR OF STAFFORD v. TILL, 4 Bing. 75.

This was an action for use and occupation, the plaintiff having proved that If the contract be executed,

must state the appellant to be a party grieved. *Rex v. the Recorder of Poole*, 1 Nev. & P. 756. Notice of appeal against a borough rate may be served on the town-clerk. *Reg. v. the Recorder of Carmarthen*, 3 id. 19. Since the Municipal Corporations Act, the mayor cannot issue his warrant for non-payment of a borough rate. *Fernley v. Worthingham*, 1 Scott, N. S. 432; 1 Man. & G. 491.

[1] In *Church v. the Imperial Gas Co.* 7 Ad. & E. 35, an action was brought for breach of contract to supply gas to a corporation. It was objected that the contract was not under the seal of the corporation. *Per Cur.* It has been considered that the plaintiffs, being a corporation, were incapable of suing in assumpsit on an executory contract, and the distinction was taken between a contract executory and executed. In support of this distinction, the case of *The East London Waterworks v. Bailey* (4 Bing. 283), was cited as a direct authority. When this case was argued, this court had not pronounced its judgment in *Beverley v. the Lincoln Gas Co.* 6 Ad. & E. 829, in which it has determined that assumpsit is maintainable against a corporation upon an executed contract for goods sold and delivered. We do not mention this latter case as directly in point, but because having there considered at some length the principles upon which the law stands as to the powers and liabilities of corporations in respect of parol contracts, we are now relieved from some parts of the inquiry which it might otherwise have been necessary to have gone through. Assuming it, therefore, to have been now established in this court that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be, whether, as affecting this point, and in respect of such contracts, there is any sound distinction between contracts executed and executory. Now, the same contract which is executory to-day may become executed to-morrow. If the breach of it in its latter state may be sued for, it can only be on the supposition that the party was competent to enter into it in its former; and if the party were so competent, on what ground can it be said that the peculiar remedy which the law gives for the enforcement of such contract may not be used for the purpose?

In *Beverley v. The Lincoln Gas Co.* 2 Nev. & P. 283, 6 Ad. & E. 829, on a writ of trial, it was proved that the plaintiff, who was a manufacturer of gas-meters, had been directed by the proprietors of the Lincoln Gas Company, which was a corporation, to make a meter for the company; and the committee subsequently ratified that order, and also gave the plaintiff an order for five more. It appeared that they had been sent under an understanding or agreement that, if they did not answer, they were to be taken back free of expense. The company ultimately rejected them, on the ground that they would not answer, but had retained them a considerable time, and, as the jury found, for an unreasonable time. It was objected, first, that under these circumstances an action of assumpsit was not maintainable; and secondly, that the corporation could not be made liable, the contract not being under seal. These objections were both overruled by the assessor, who reserved the points, and the plaintiff recovered a verdict. On motion to set the verdict aside, the court held, that a corporation aggregate may enter into a contract not under their common seal, and may be sued in assumpsit for the breach of it.

a corporation aggregate may sue, though the contract was not by deed, as for the use and occupation of a house.

the defendant was in the occupation of the house, and that four years' rent was due at Michaelmas, 1825, and that he had made several payments previously to that time. It was objected for the defendant that the action could not be maintained, on the ground that assumpsit would not lie for use and occupation at the suit of a corporation, but that their remedy, if any, was by an action of debt, and even then that a demise by a corporation could only be by deed. The jury, however, found a verdict for the plaintiff.

Per Cur. In this case an application has been made for a non-suit, or that the judgment might be arrested, on the same question, namely, whether a corporation aggregate can maintain an action for use and occupation against a party who has occupied premises under them, and which was their property. As the defendant had occupied, the contract was executed, and, therefore, no express promise need have been proved. It may be inferred that where property has been enjoyed, the party who has occupied is bound to pay, and the law will infer a promise to do so. In executory contracts it is different, as in such cases there must be a mutuality of obligation, to which a corporation aggregate can only assent or be a party by deed. Here, however, is a good consideration, as from the enjoyment of the land by the defendant a promise must be inferred.

(B) *Evidence.*[1]

XIII. Relative to Corporations Foreign[2] and Scotch Burghs.[3]

CORPORAL Punishment.[4]

A corporation was held entitled to maintain assumpsit for the occupation of tolls of a market, although no interest had passed by grant under seal. *Mayor &c. of Carmarthen v. Lewis*, 6 C. & P. 608. *See* 3 Macq. H. L. C. 382.

[1] An examined copy of a charter deposited in the proper public office at Madrid:—*Held* sufficient proof of the plaintiffs being a corporation according to the laws of Spain. *National Bank of St. Charles v. De Bernales*, 1 R. & M. 190; 1 C. & P. 569. So, copies of an ancient schedule produced from the muniments of the corporation, delivered to the toll collectors, and by which they collected:—*Held* admissible for the corporation, although it would have been otherwise if not shown to have been delivered from the corporation, however accurately corresponding. *Brett v. Beales*, Mylne & K. 417.

A corporation cannot appoint an attorney except under their corporate seal. *Arnold v. Mayor of Poole*, 4 Man. & G. 860. But having retained an attorney, it is not necessary to render the corporation liable that they should expressly authorise the particular steps in the business for which he was retained. *Reg. v. Town-Council of Litchfield*, 10 Q. B. 534. The mere absence of a retainer under seal will not render a payment from the borough fund to the attorney illegal. *Reg. v. Prest*, 20 L. J. Q. B. 17.

And where a private act of parliament constituting a railway company provided that the directors might appoint or displace any of the officers of the company, it was held that the appointment of an attorney to the company need not be under seal. *Reg. v. Justices of Cumberland*, 5 D. & R. 431; 17 L. J. Q. B. 102.

The declaration is the same as in ordinary cases, care being taken to insert the corporate name. This in the case of the municipal corporation of a borough is the mayor, aldermen, and burgesses of the borough of ——. *See* 5 & 6 Wm. 4, c. 76, s. 6. In the case of a city corporation, it is "the mayor, aldermen, and citizens of the city of ——. *Attorney-General v. Corporation of Worcester*, 2 Phil. 3; 15 L. J. Ch. 398.

[2] A corporation in a foreign country may sue in this by their corporate name (Grant, Corp. 50); and held, that, where they sued by the name of the National Bank of St. C., and it appeared that the name given in the charter was "The Bank of St. C.," the variance was immaterial, if the jury were satisfied as to their identity. *National Bank of St. Charles v. De Bernales*, 1 R. & M. 190; 1 C. & P. 569.

[3] Where, upon the Crown having restored a Scotch burgh, an action of reduction and declaration was raised for setting aside the election of magistrates:—*Held*, that it was to be deemed an annual election, and a complaint within the intent and meaning of the stats. 7 Geo. 2, c. 16, s. 7, and 16 Geo. 2, c. 11, s. 72; and the action, therefore, to be brought within two months. *Tod v. Tod*, 1 Bligh, N. S. 639. 2. The form of election to offices of a Scotch burgh is of the essence of the election; and it is not competent to the Court of Session to sustain it where the form has not been observed, although the result may be the same; and a usage of forty years may alter the original constitution of the burgh. *Gardner v. Reekie*, 1 Bligh, N. S. 646.

[4] A master may correct his scholar, ap-

CORPOREAL and Incorporeal Things.[1]

CORPUS Delicti.[2]

CORRUPTION of Blood.[3]

COSTS.[4]

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II. Of the Plaintiff's Right to his Costs of Suit in Actions of Tort where the Damages are under 40*s.* p. 292.

prentice, or servant, under age, provided he do so moderately and with a fit instrument (*Keits' case*, 3 Salk. 47); but if the correction be immoderate (id.), or if the beating be not by way of correction, but from revenge, the master is as much punishable for it by law as if the relation of master and servant, &c. did not exist. *See* 2 Hill, T. 202, 569. But if a parent in correcting his child, a schoolmaster his scholar, a master his apprentice, &c., cause the death of the child, &c., it is murder, manslaughter, or excusable homicide, according to the circumstances under which it is committed. If he have wilfully used an instrument likely to kill, or continued the punishment longer than it was probable the child could bear, the killing would be deemed murder. 1 Hale, 473; Fost. 262; *R. v. Wiggs*, 1 Leach, 379. If with an instrument likely to kill, but with intention not of killing but of merely frightening the deceased, it will be manslaughter. *R. v. Connor*, 7 Car. & P. 438; 1 Hale, 473; 1 East, P. C. 261; Fort. 262.

Sentence of whipping is not to be awarded to female offenders, but instead imprisonment or solitary confinement. 1 Geo. 4, c. 57.

[1] Things are divided into things real and personal, and again into things corporeal and things incorporeal. The former are things which are the objects of sense, consisting of such things as may be seen and handled: such as houses and land. Incorporeal are those which are objects of the mind alone, consisting of rights to certain benefits, derivable from or connected with corporeal things, whether real or personal. *See* 2 Bl. Com. 17, 20; 1 Cruise, T. 1, ss. 2, 7; Burton, s. 4. Thus a house is corporeal, but the rent paid for occupying it is incorporeal. An annuity again is incorporeal, for though the money produced by it is of a corporeal character, the annuity itself is a thing invisible. It is evidenced by the deed granting it, and has only an existence in the mind, and cannot be delivered over from hand to hand. Corporeal property, on the contrary, is capable of manual transfer, and of such as is immovable possession may be given up. In many cases incorporeal property exists apart from the ownership of anything corporeal, forming a distinct subject of possession transferable from one person to another, and in such separate transfer lay till lately the practical distinction between incorporeal and corporeal property. In ancient times the impossibility of actually delivering up anything of a separate incorporeal nature rendered necessary some tantamount means of conveyance. For this purpose writing was had recourse to, whilst transfer of corporeal property was long permitted to be effected by the simple delivery of it. Hence incorporeal property was technically said to "lie in grant," and corporeal to "lie in livery," *i. e.* delivery of the seisin of feudal possession by actual or symbolical delivery. In the year 1845, however, this ancient distinction was abolished by stat. 8 & 9 Vic. c. 106, s. 2, which enacts that henceforth all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

[2] In the law of evidence the body, substance, or foundation of an offence. The substantial and fundamental fact of its having been committed. *Lord Stowell*, 1 Haggard's C. R. 105. *Lord Kenyon*, 1 East, 306. Best on Presumptions, 269, s. 201, *et seq.* The body or substance of a crime, as distinguished from the particular form given to it by its connexion with the party accused. The subject of a crime or its visible effect, such as a body slain, a house burned, or their remains; *corpus* being used in its ordinary sense of a material substance.

[3] The extinguishment of the inheritable quality of a person's blood, in consequence of attainder for treason or other felony, so that he can neither inherit any estate nor transmit it to others by descent. 2 Bl. Com. 251, 256; 1 Steph. Com. 408, 411; Lid. sect. 747. The law on this subject has been considerably modified by the statutes 54 Geo. 3, c. 145; 3 & 4 Wm. 4, c. 106; and 4 & 5 Wm. 4, c. 23; 1 Steph. Com. 413; Smith's R. & P. P. 414, 415. As to affecting gavelkind, id. 434. In the United States corruption of blood is abolished. 2 Kent's Com. 386.

[4] *See* Hullock on Costs; Gray, id.; Marshall, id.

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XVIII. Lien of Attorney for Costs. *See* vol. ii. p. 57, *et seq.*

XIX. As to the Costs in Particular Proceedings:—

(A) *In Particular Actions.*

See	Judgment, Action on	Trespass
Ejectment	Replevin	Trover

(B) *As to Particular Writs.*

Certiorari, ante, p. 58	Inquiry	Process
Extent	*Mandamus*	Prohibition
Habeas Corpus		*Scire Facias*

(C) *As to Particular Causes of Action.*

Annuity, vol. i. p. 360	Common, *ante*, p. 143	Insurance
Apprentice, id. p. 394	Compounding, id. p. 161	Libel
Arbitration and Award, id. p. 427	Contracts, id. p. 193	Malicious Arrest
	Copyhold, id. p. 223	Mesne Profits
Assault and Battery, id. p. 562	Deceit	Mortgage
	Forcible Entry	Party Wall
Bail Bond, vol. ii. p. 77	Free Warren	Penalty
Bastards, id. p. 384	Game	*Scandalum Magnatum*
Bills and Notes, id. p. 400	Highways	Slander
Bond, id. p. 504	Imprisonment	Tithes
Bribery, id. p. 535	Inclosures	Waste

(D) *As to Particular Persons.*

Attorney, vol. ii. p. 5
Bail, id. p. 74
Bankruptcy, id. p. 141
Baron and Feme, id. p. 373
Churchwardens, *ante*, p. 114
Clerk of the Peace, id. 124
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Excise and Custom-house Officers
Executors and Administrators
Infant
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Ingrossers
Jury
Justices of the Peace
Outlaws
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Surveyors

(E) *As to Miscellaneous Proceedings.*

Abatement, vol. i. p. 4
Admiralty, id. p. 183
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Auditâ Querelâ, vol. ii. p. 66
Demurrer
Discontinuance
Error
Feigned Issue
Foreign Attachment
Hundred
New Trials
Nolle Prosequi
Outlawry
Payment of Money into Court
Qui tam
Remanet
Repleader
Rules, Motions, and Orders
Sessions
Sham Plea
Staying Proceedings
Striking out Counts
Trial

(F) *Costs in the County Courts.* *See post*, County Courts.

(G) *In the Probate and Divorce Court.* *See* Administration, vol. i. p. 163; Judicial Separation; Probate.

I. Of the Nature of a Party's Right to his Costs of Suit.

(A) *Costs first given to Plaintiffs by the Statute of Gloucester.*[1]

(*a*) *To what Cases the Statute of Gloucester applies.*[2]

[1] No costs are recoverable by the common law. But before they were given by statute, if the plaintiff failed in his action he was amerced *pro falso clamore;* if he succeeded, the defendant was *in misericordia* for his unjust detention of the plaintiff's rights: but he was not liable for the payment of any costs of suit, at least under that title. Hull. *Law of Costs*, 1. In reality, however, costs were always considered and included in the *quantum* of damages in such actions where damages are given. 3 Bl. Com. 399. But as the damages thus awarded proved frequently inadequate to compensate the plaintiff for his expenses, and the recovery of costs in this shape being uncertain, the legislature provided a remedy by enacting the Statute of Gloucester, 6 Edw. 1, c. 1. That statute provides "that the demandant shall recover damages in an assize of novel disseisin, and in writs of mort d'ancestor, cosinage, aiel and beziel; and further, that the demandant may recover against the tenant the costs of his writ purchased, together with the damages abovesaid: And this act shall hold place in all cases where the party is to recover damages." The statute only makes mention of the costs of the writ, but, by a liberal interpretation, it has been extended to all legal costs of a suit. 2 Inst. 288. The right to costs under the Statute of Gloucester is also entirely independent of the amount of damages. The merest nominal damages were sufficient to entitle the plaintiff to his costs. And the plaintiff is entitled to nominal damages, although no actual damage is proved, wherever there is a breach of contract or any injury to the right arising out of a contract (*Marzetti v. Williams*, 1 B. & Adol. 415. *Green v. Greenbank*, 2 Marsh. 485); and wherever any act injures another's rights, and would be evidence in future in favour of the wrongdoer (*Mellor v. Spateman*, 1 Wms. s. 345, n. a); and in any other case where a cause of action is made out, but no real loss is shown. See *Wells v. Watling*, 2 W. Black. 1233. *Weller v. Baker*, 2 Wils. 414. Nominal damages, indeed, are regarded merely as "a peg on which to hang costs." *Per Maule, J.: Beaumont v. Greathead*, 3 C. B. 494. And their entry, where the plaintiff is entitled to them, is quite of course, and a matter of form, in which the jury cannot exercise any discretion. *Reg. v. Fall*, 1 Q. B. 636. Therefore, should the jury refuse to give them (*Feize v. Thompson*, 1 Taunt. 121), or the entry of them be accidentally omitted (*Reg. v. Fall*, *supra*), they may be afterwards entered by the court.

[2] Costs being in the nature of a satisfaction to reimburse the expenses of the recovery of a party's lawful demand, or the enforcement of his legal right, it follows

(B) *From what the Defendant's Right to Costs is derived.*[1]

II. Of the Certificate for Costs in Actions of Tort where the Damages are under 40*s.*

(A) *If Damages are under 40s. in Action for a Tort, the Plaintiff has no Costs unless the Judge certifies.*

Repeals the 43 Eliz. c. 6, as regards actions of trespass and on the case, and the 22 & 23 Car. 2, as relates to personal actions.

By 3 & 4 Vic. c. 24, s. 1, after reciting the 43 Eliz. c. 6, "An Act to avoid Trifling and Frivolous Suits in Law in her Majesty's Courts in Westminster," and the 22 & 23 Car. 2, c. 9, "An Act for laying Impositions on Proceedings at Law," which recites that many good subjects of this realm have been and daily are undone by such suits, contrary to the intention of the said statute of Queen Elizabeth; but the same evil, notwithstanding, doth still prevail and increase, and it is expedient to make further provisions for the prevention thereof, it is enacted, "that the said recited act of the forty-third of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the twenty-second and twenty-third of Charles the Second as relates to costs in personal actions, be and they are hereby repealed."

If damages under 40*s.*

By sect. 2 it is enacted, "that if the plaintiff in any action of trespass, or of

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that, in order to entitle him to them, it is necessary that he should have sustained some damage for reason of the non-performance of a duty to him. *Reg. v. Fall, supra. Kynaston v. the Mayor, &c. of Shrewsbury*, 2 Stra. 1051.

Upon this doctrine, and upon the fact that the Statute of Gloucester gives costs only where damages are recovered, questions have been raised with reference to subsequent statutes giving damages in cases where no damages could have been recovered previously to the Statute of Gloucester. It is laid down by Lord Coke (2 Inst. 289), that this clause of the Statute of Gloucester extends to give costs where damages are given to any demandant or plaintiff by any statute made after that parliament. A distinction was, however, subsequently drawn between those cases where an action is given in a matter where damages might be recovered at the common law, and those where damages are newly given where no damages were formerly recoverable, and it was said that to the former only is the Statute of Gloucester applicable. *Pilfold's cases*, 10 Co. 116, a; Gilb. C. P. 268; 1 Hull. L. of C. 4; Dwar. on Stat. 644, 2d ed. But in all cases where a party sustains a damage, and a subsequent statute gives the remedy, he is entitled to costs. *Tyte v. Glode*, 7 T. R. 267. *Witham v. Hill*, 2 Wils. 91. He is likewise entitled, where the subsequent statute increases the damages, in a case where some damages were recoverable at the common law. 10 Co. 116, a; 2 Inst. 289; 1 Vent. 22. And where by any act since the Statute of Gloucester an action is given to the party *grieved*, he is entitled to costs if he succeed, although he had no remedy before that act. *Ward v. Snell*, 1 H. Black. 10. *Cresswell v. Hoghton*, 6 T. R. 355. *Calliford v. Blawford*, 1 Show. 354. And the like rule applies with respect to a penalty. *Mayor and Corporation of Plymouth v. Werring*, Willes, 440. And even in a case where no damage could have been recovered at the common law, and no individual injury is sustained, if a subsequent statute enabling a person to issue a *mandamus* empower him to traverse the return, the liberty so to do of necessity includes the recovery of some damage if the party traversing obtain a verdict, and in such case he is entitled to his costs. *Reg. v. Fall*, 1 Q. B. 636. *Reg. v. Kelk*, id. 660. And it has been laid down as a general rule, that where a right is vested in a particular person or corporation, the withholding of that right, and thereby compelling the party to sue for it, is an injury for which damages may be recovered; and if damages may be recovered, costs will follow. *The College of Physicians v. Harrison*, 9 B. & C. 524. *Company of Cutlers v. Ruslin*, Skin. 363. But no costs can be recovered in any action prosecuted by a common informer, or prosecutor *qui tam*, except costs are expressly given by the statute inflicting the penalty; because, antecedent to the commencement of the suit, a plaintiff who sues as a common informer has no right of action vested in him, or any interest in the penalty. *Shore v. Madiston*, 1 Salk. 206. *Wilkinson v. Allot*, Cow. 366. *See post*, Damages.

[1] The defendant's right to costs is, like that of the plaintiff, derived entirely from statutory enactments. Marshall on Costs, p. 4. Unless an action in which he succeeds comes within the provision of some statute giving costs, he is not entitled to any. *Reg. v. Kelk*, 1 Q. B. 660. The Statute of Marlbridge (52 Hen. 3, c. 6) first gave a defendant his costs of suit in a case relating to wardship in chivalry. Costs were given to a defendant in error by the 3 Hen. 7, c. 10, and 19 Hen. 7, c. 20; and in replevin by the 7 Hen. 8, c. 19. In no other case were any costs allowed the defendant by either the common or statute law till the 23d year of King Henry 8. However, now, by a variety of statutes, a defendant when he prevails is entitled to the same costs as the plaintiff would have had in case he had recovered. Hull. L. of C. 121; Marsh. id. 4.

trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, or in the court of Common Pleas at Lancaster, or in the court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer, before whom such verdict shall be obtained, shall *immediately* afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought *to try a right*, besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance, in respect of which the action was brought, was wilful and malicious."

In action for a tort, the plaintiff has no costs, unless the judge certifies action brought to try a right.[1]

(B) *By whom Certificate must be granted.*[2]

(C) *Within what time Certificate must be given.*[3]

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[1] The act 8 & 9 Wm. 3, c. 11, s. 4, applies to similar actions as the statute of Victoria, and is unrepealed by it (*Sherwin v. Swindell*, 12 Mee. & W. 783) for the prevention of *wilful and malicious* trespasses to plaintiff, enacting "that in all actions of trespass to be commenced or prosecuted from and after the 25th day of March, 1697, in any of his Majesty's courts of law at Westminster, wherein, at the trial of the cause, it shall appear to be certified by the judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding. The statute of Victoria leaves the statute of William wholly untouched, except in the particular case mentioned in the 3d section; *i.e.* of a trespass committed after a written notice, and the further requirement that the certificate must be given immediately, and that the plaintiff is totally deprived of costs, instead of obtaining, as under the statute of William, no more costs than damages. *Sherwin v. Swindell*, 12 Mee. & W. 783. The acts apply, notwithstanding a statute gives the plaintiff treble damages. *Doe d. Hughes v. Derry*, 9 C. & P. 494. The statute of Victoria includes, in express terms, the assessment of damages under a writ of inquiry, where judgment has passed by default; but it does not apply to an inquiry after judgment on demurrer. *Taylor v. Rolfe*, 5 Q. B. 337. The statute relates to a case where there is plurality of issues. *Richmond v. Johnson*, 7 East, 583. If the cause of action be divisible; and as to one part the plaintiff has recovered trifling damages; *i. e.* under 40*s.*; and as to the other part he has recovered none; and as to both, the defendant has pleaded falsely: the plaintiff, as to the pleas given to the former, will, in the absence of a certificate, be entitled to no costs, but, as to the latter, he will be entitled to the costs of those issues on which he has succeeded. *Sharland v. Twining*, 1 Ex. 375. *Newton v. Rowe*, 1 C. B. 187. And if, on a reference of a cause, the arbitrator be empowered to certify as a judge, his certificate will entitle the plaintiff to costs in a case where, but for such certificate, his award would be insufficient for that purpose. *Spain v. Caddell*, 9 Dowl. 745. But he cannot certify unless by the terms of submission he has power to do so. *Swinglehurst v. Altham*, 3 T. R. 138. *Wigins v. Cook*, 6 C. B. (N. S.) 784. *Ward v. Mallinder*, 5 East, 489. However, if the action is clearly brought to try a right, if the award be made in favour of the plaintiff, and the costs are to abide the event, the plaintiff will be entitled to them without a certificate. *Griffiths v. Thomas*, 4 D. & L. 109.

[2] Where a writ of trial or inquiry directed to the sheriff is executed by the undersheriff, the certificate should be given in the name of the sheriff. *Stroud v. Watts*, 2 C. B. 298.

The court will not review the exercise of the discretion of the judge in certifying. *Merrick v. Wakley*, 6 Jur. 802. It is doubtful whether a judge has power to rescind his certificate. *Whalley v. Williamson*, 5 Bing. N. C. 200. *Anderson v. Sherwin*, 7 C. & P. 527.

[3] The act requires that the certificate should be given immediately after the verdict; but the courts construe the expression as if it were within a reasonable time. *Page v. Pearce*, 8 Mee. & W. 677. It has been held that a certificate given on the same day, but after an adjournment of the court, was in time (*Thompson v. Gibson*, 8 Mee. & W. 287); and so where the jury in the next cause were partially sworn. *Nelmes v. Hedges*, 2 Dowl. N. S. 350. But it is too late after the lapse of several days. *Gillett v. Green*, 7 Mee. & W. 347. And perhaps it is necessary that it should be at least granted on the same day as that on which the cause was tried.

A certificate in the alternative, if it should become necessary to certify, enables the judge afterwards to grant a formal certificate. *Jones v. Williams*, 13 Mee. & W. 420. And where the judge intimated at the trial that he should consider whether he would certify under a statute which used the word "forthwith," and subsequently gave a certificate, it was held to be effectual. *Haden v. Atlantic*

(D) *Court will not review the exercise of the Judge's Discretion in Certifying.*[1]

(E) *Certificate that Action was brought "to try a Right."*[2]

(F) „ *Trespass was "Wilful and Malicious."*[3]

(G) *The Act does not extend to Trespass to Land after Notice.*[4]

The act does not extend to actions for trespass to land after notice.

By 3 & 4 Vic. c. 24, s. 3, it is provided and enacted, "that nothing herein contained shall extend to or be construed to extend to deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or inclosures; or for entering into any dwellings, out-buildings, or premises, in respect of which any notice not to trespass thereon or therein[5] shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."[6]

Royal Mail Steam Navigation Co. 29 L. J. Q. B. 191. If by the misprision of the officer the certificate should be defective in form, the judge may, within a reasonable time afterwards, amend the mistake, and order it to be entered *nunc pro tunc*. *Shuttleworth v. Coker*, 1 Man. & G. 829.

[1] If the case falls within the scope and object of the act, and the judge certify, the court will not interfere with the exercise of his discretion. *Barker v. Hollier*, 8 Mee. & W. 513. *Shuttleworth v. Coker*, 1 Man. & G. 829. *Pryme v. Brown*, 4 id. 247. But where the case is such that the judge who tried it cannot, on any view of it, grant a certificate within the act, or, if he did, it would be useless, it is considered to be a case out of the operation of the statute. *Smith v. Edwards*, 4 Dowl. 621. *Peddle v. Kiddle*, 7 T. R. 660. *Wright v. Piggin*, 2 Y. & J. 544.

[2] An action may be brought to try a right, although it does not appear by the record that any right is in controversy: as, where the action is for a nuisance. *Shuttleworth v. Coker*, 1 Man. & G. 829. The judge may certify, if on any view of the case a mode may be suggested by which the plaintiff may have been convinced that in bringing the action he was preventing his own right from being injured, as well as recovering damages for the injury which he had sustained. *Per Bosanquet, J.: Stanley v. Salmon*, 9 Dowl. 387; 2 Scott, 454. See *Marriott v. Stanley*, 1 Man. & G. 853.

[3] If a man inadvertently walk across another person's close the action would be frivolous, and the judge ought not to certify. But suppose the walking across the close to be proved to have been done maliciously, by and with a view of annoying the owner or his family, then the judge would be justified in granting the plaintiff a certificate that the trespass was wilful and malicious. *Shuttleworth v. Coker*, 1 Man. & G. 829. Even where malice is the foundation of the action, and the jury by their verdict find its existence, the judge may refuse to certify; as in an action of libel (*Foster v. Pointer*, 8 Mee. & W. 395. *Sherwin v. Swindall*, 12 id. 783; 1 D. & L. 999), or malicious prosecution. *Tabbutt v. Holt*, 1 C. & Kir. 280.

If, however, the action be for slander, and the words being spoken of the person (*Brown v. Gibbons*, 1 Salk. 206), and not amounting to *scandalum magnatum* (*Lord Bolingbroke v. Woodfall*, Hull. L. of C. 35), are actionable in themselves, or by reason of their being spoken of the plaintiff in his trade or business (*Lowe v. Harewood*, Sir W. Jones, 196. *Greenfell v. Parson*, 1 Dowl. 406. *Barry v. Perry*, 2 Ld. Raym. 1588), and the jury find damages to a less amount than 40*s.* the plaintiff, by stat. 21 Jac. 1, c. 16, s. 6, is entitled to no more costs than damages, and the judge has no power to certify to entitle him to full costs. *Evans v. Rees*, 30 L. J. C. P. 16; 9 C. B. 391. *Goodal v. Easell*, 1 C. M. & R. 249. It is otherwise if the words are not actionable, and the action is maintained by reason of special damage: in such case the judge may certify, under the stat. of Victoria, that the grievance was malicious, so as to entitle the plaintiff to full costs. *Pryme v. Brown*, 2 Scott, N. R. 739; 1 Wms. S. 249, n. u. *See* 2 F. & F. 200.

[4] In cases within this section, the plaintiff is entitled to his costs as of right, and the judge will certify to entitle him. *Sherwin v. Swindall*, 12 Mee. & W. 773; 1 D. & L. 999. See *Daw v. Hole*, 15 L. J. Q. B. 32. And if there is no certificate, he may enter a suggestion of the fact upon the record (*Boyer v. Cook*, 4 D. & L. 816; 4 M. G. & Scott, 236; 16 L. J. C. P. 177), which may be traversed (*Watson v. Quilter*, 11 Mee. & W. 760), and thus entitle himself to costs.

[5] The notice must be, not to commit the identical trespass which the defendant has committed. *Bourne v. Alcock*, 3 Gale & D. 600; 4 Q. B. 621. The continuing of stakes on the plaintiff's land after notice in writing requiring their removal, was held to be a trespass after notice. *Boyer v. Cook*, 4 D. & L. 816.

[6] The section applies only to written notices served upon or left at the last reputed or known place of abode of the defendant,

III. Certificate in Actions of Contract where less than 40*s.* are Recovered.

(A) *Plaintiff deprived of Costs by Certificate.*

By the 43 Eliz. c. 6, s. 2, it is enacted, that "if, in any personal action, to be brought in any of her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein shall not amount to the sum of 40*s.* or above, that in every such case the judges and justices before whom such action shall be pursued shall not award to the plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount to, but less at their discretion."

(B) *Operation of Statute.*[1]

(C) *In what Cases Judge may Certify.*[2]

(D) *Within what time Certificate must be granted.*[3]

IV. Certificate to Deprive Plaintiff of Costs in Actions of Tort where less than 5*l.* is Recovered.

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leaving unaffected the case of a verbal notice or a notice posted upon the land. "It is clear from the cases," said *Mr. Baron Parke*, "that originally the judges considered themselves absolutely bound to certify in all cases where the trespass was after notice (*Reynolds v. Edwards*, 6 T. R. 11. *Swinton v. Jervis*, id. 12); but the true construction of the statute is that which is stated in *Good v. Watkins* (3 East, 495), and which is now put upon it, namely, that the judge has a discretion in the matter, although that discretion will generally be exercised in favour of the plaintiff, where notice has been given." *Sherwin v. Swindall*, 12 Mee. & W. 783; 1 D. & L. 999.

[1] The statute of Elizabeth is, as to actions of trespass and on the case, repealed by the 3 & 4 Vic. c. 24. *See ante*, p. 292. It still applies, however, to actions founded upon contract (*Townsend v. Dyme*, 2 C. & Kir. 381), and in fact to all personal actions which are not by the statute of Victoria exempted; namely, all actions on promises, or on debt, covenant, detinue, or replevin. The judge may certify to deprive the plaintiff of his costs, notwithstanding the action is brought on a statute directing that the plaintiff shall recover his costs. *Richardson v. Barnes*, 4 Ex. 128. *Irwin v. Reddish*, 5 B. & A. 796. *Williams v. Miller*, 1 Taunt. 400. *Simpson v. Hurdis*, 5 Mee. & W. 85.

This statute is now of little practical importance, its effect being superseded by that provision of the County Courts Acts which requires the plaintiff to have a certificate or order where the amount recovered does not exceed 20*l.*; therefore, in a case where the judge would have certified under the statute of Elizabeth, the same object may be gained by withholding the order or certificate under these acts. *See post*, p. 296.

[2] If the plaintiff has in fact recovered 40*s.* or more, the judge has no power to certify. *Nurdin v. Fairbanks*, 20 L. J. Ex. 20. As where 40*s.* or more are paid into court, and taken out in part satisfaction, and something, however little, is recovered at the trial (*Richards v. Bluck*, 6 C. B. 437), provided the aggregate amount exceed 40*s.* (*Bartlet v. Robins*, 2 Wils. 258), the judge may certify, notwithstanding the matter was not within the jurisdiction of any inferior court (*Pyeburn v. Gibson*, 8 Moore, 450. *Dand v. Sexton*, 3 T. R. 37), or the defendant was privileged to be sued in the superior court (*Wright v. Nuttall*, 10 B. & C. 492), and although the action is brought on a statute which gives the plaintiff "full costs" (*Irwin v. Reddish, supra. Williams v. Miller, supra. Simpson v. Hurdis, supra*); he may certify notwithstanding the defendant has pleaded pleas founded on the same matter of defence. *Simpson v. Hurdis, supra.*

There is an exception of any case in which the title to land is in question, the judge having no power to certify if, either by the pleadings or evidence, it appears that the title is in question. *Thomas v. Davies*, 3 Nev. & P. 567. *Tyler v. Bennett*, 5 Ad. & E. 377. *Purnell v. Young*, 6 Dowl. 347. *Pugh v. Roberts*, id. 561. *Rawlings v. Till*, id. 159. *Bone v. Dawe*, 5 Nev. & M. 230. *Dunnage v. Kemble*, 3 Bing. N. S. 538. *Scruton v. Taylor*, 8 Dowl. 110. *Littlewood v. Wilkinson*, 9 Price, 314. *Wright v. Piggin*, 2 Y. & J. 544. *Smith v. Edwards*, 4 Dowl. 621. *Jones v. Thomas*, 9 L. J. Q. B. 16.

[3] The judge is not bound to certify at the trial, but he must do so before judgment. *Lyons v. Hyman*, 5 Ex. 749. *Davis v. Cole*, 6 Mee. & W. 624. It is no bar to granting a certificate that the costs have been taxed. *Foxall v. Banks*, 5 B. & A. 536.

(A) *The Judge, by Certifying in an Action for a Wrong in which less than 5l. is recovered, deprives the Plaintiff of Costs.*

The judge, by certifying in an action for a wrong that it was not brought to try a right, &c., in which less than 5*l.* is recovered, deprives the plaintiff of costs.

23 & 24 Vic. c. 126, s. 34. "When the plaintiff, in any action for an alleged wrong in any of the superior courts, recovers, by the verdict of a jury, less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought."[1]

V. Of the Effect of the County Courts Acts on the Plaintiff's Right to his Costs of Suit.[2]

(A) *If the Plaintiff does not Recover more than 20l. in Contract, or 5l. in Tort, in Actions over which the County Court has jurisdiction, he has no Costs.*

Plaintiffs recovering in the superior courts sums not exceeding 20*l.* in actions of contract, or 5*l.* in actions of tort, over which the county court has jurisdiction, to have no costs.

13 & 14 Vic. c. 61, s. 11. "And be it enacted, that if in any action commenced after the passing of this act in any of her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if in any action commenced after the passing of this act in any of her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction,[3] the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court, or otherwise."

(B) *Unless the Judge certify at the Trial.*

But judge at trial may certify, to entitle him to them.

13 & 14 Vic. c. 61, s. 12. "Provided always, and be it enacted, that if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court

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[1] The certificate must follow the words of the statute, and state all three matters; *i. e.* that the action was not brought to try a right, that the trespass was not wilful or malicious, and that the action was not fit to be brought. *Gooding v. Britnall*, 31 L. J. C. P. 5. See *Saunders v. Kirwan*, 30 id. 351, as to actions for malicious prosecutions. The statute applies to an action commenced before, if tried after the act came into operation. *Wright v. Hale*, 30 L. J. Ex. 40. As to an action of detinue, *see* 31 L. J. C. P. 31.

[2] As to the operation of the London Small Debts Act, 15 & 16 Vic. c. 77 (*see post*, London Small Debts Act), it has been held, that where the judge intimated immediately after the delivery of the verdict that he should consider whether he should grant the plaintiff a certificate under the 121st sect. of the act, which requires that the judge should forthwith certify, to entitle a plaintiff recovering less than 20*l.* to costs, and the judge afterwards did certify, the defendant was, by his acquiescence at the trial in not then objecting, estopped from afterwards raising any objection. *Haden v. Atlantic Mail Steam Packet Co.* 29 L. J. Q. B. 191. *Bayley v. Bryant*, E. & E. 340.

[3] In the excepted actions the plaintiff, if successful, has his costs, independently of the amount of damages, subject to the restriction of the statutes, taking them away where the damages are less than 40*s.*, and the power of the judge to certify to deprive the plaintiff of costs in actions of tort under the 23 & 24 Vic. c. 126, s. 34, where the damages are under 5*l.* *See ante*, p. 292.

as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed."

(C) *Or he afterwards obtain the Order of the Court or a Judge giving him Costs.*

In certain cases the plaintiff is entitled to costs by the order of the court or a judge.

15 & 16 Vic. c. 54, s. 4. "In any action in which the plaintiff shall not be entitled to recover his costs by reason of the provisions of the 11th sect. of 13 & 14 Vic. c. 61, whether there be a verdict in such action or not, if the plaintiff shall make it appear[1] to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that such action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the the 128th sect. of the 9 & 10 Vic. c. 95,[2] or in which no plaint could have been entered in any such county courts,[3] or that such action was removed from a county court by *certiorari*, or that there was sufficient reason for bringing such action in the court in which such action was brought, then, and in any of such cases, the court in which such action is brought, or the said judge at chambers, *shall* thereupon, by rule or order,[4] direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if the before-mentioned act of the 13 & 14 Vic. c. 61, had not been passed."

(D) *What is "the Sum Recovered?"*

CHAMBERS v. WILES, 24 L. J. Q. B. 267.

Where the plaintiff

The plaintiff claimed to recover 35*l.* 11*s.* 9*d.* The defendant paid into court a sum under 20*l.* namely, 7*l.* 1*s.*, and the plaintiff took that sum out in full

[1] It is no bar to the application that the judge who tried the cause has refused to certify. *Sharp v. Eveleigh*, 20 L. J. Ex. 282. *Sed vide Hatch v. Lewis*, *infra*.

[2] The cases in which concurrent jurisdiction is given to the superior courts and county courts by 9 & 10 Vic. c. 95, s. 128, and in which therefore the defendant is entitled to an order for his costs, are these:—1. "Where the plaintiff dwells more than twenty miles from the defendant:" with reference to which it is to be observed that the distance is measured, not by the nearest mode of access, but by a straight line on a horizontal plane. *Lake v. Butler*, 5 E. & B. 92. *Stokes v. Grissell*, 14 C. B. 678. If there be several plaintiffs, or several defendants, in either event all of them must dwell within that distance of the plaintiff or defendant, as the case may be, in order to deprive the superior courts of their concurrent jurisdiction. *Hickie v. Salomo*, 8 Ex. 59. *Parry v. Davies*, 19 L. J. Ex. 284. *Doyle v. Lawrence*, 2 L. M. & P. 368. *Bayley v. Bryant*, *ante*, p. 296. A trading corporation dwells at the chief office at which its business is carried on. *Taylor v. Crowland Gas Co.* 11 Ex. 1; 24 L. J. Ex. 233. A railway company does not "dwell" at each of its stations, but at the principal office only. *Shiels v. Great Northern Railway Co.* 30 L. J. Q. B. 331. *See* further *post*, County Courts.—2. Where the cause of action did not arise wholly or in some material point within the jurisdiction of the county court within which the defendant dwells or carries on his business at the time of the action brought. *See post*, County Courts. *See* 6 H. & N. 160; 30 L. J. Ex. 21.—3. Where any officer of the county court is a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof. *See post*, County Courts.

[3] *See post*, County Courts, Jurisdiction. On the ground that no action could have been brought in the county courts, the plaintiff in an action of detinue has been held entitled to his costs without a certificate, where the jury assessed the value of the goods at an amount exceeding 50*l.*, but the damages were merely nominal, the goods having been returned after the commencement of the action. *Leader v. Rhys*, 30 L. J. C. P. 345; 10 C. B. (N. S.) 349; 7 Jur. 1199.

[4] It is obligatory on the court or judge to grant the rule or order where the facts, satisfactorily established, bring the case within the category of those in which the plaintiff ought to recover his costs. See *Macdougall v. Paterson*, 11 C. P. 755. *Crake v. Powell*, 21 L. J. C. P. 27. *Asplin v. Blackman*, 7 Ex. 386. The application ought, in general, to be made to a judge at chambers, and not to the court, in the first instance. The court will review the judge's decision at chambers upon the point. *Stokes v. Grissell*, 14 C. B. 678. *Sanderson v. Proctor*, 10 Ex. 189. *Warman v. Halahan*, 30 L. J. Q. B. 48. The power given to the court is not an appellate but an original juris-

claims more than 20*l.*, and less is paid into court, and taken out in satisfaction, the case is not within the section.[1]

satisfaction of his claim. No order was made by any judge giving the plaintiff his costs, but, without an order, the costs were taxed for him by the master. It was contended, on a motion for a review of the taxation, that the master was wrong in so doing.

Coleridge, J. "I find on inquiry that as many as four judges have considered the point, and have thought that the taxation of the plaintiff's costs under similar circumstances was right. They have done that upon the construction of the 13 & 14 Vic. c. 61, s. 11, and without reference to the 73d section of the 15 & 16 Vic. c. 76. Those learned judges, comparing the expressions of the 11th section with the language afterwards used in the two following sections, were of opinion that the plaintiff had not recovered a sum under 20*l.*, for that taking the money out of court was not a recovery within the meaning of the act of parliament. I am of opinion that they have come to a right conclusion, and that upon the whole a different construction might lead to mischievous consequences. The law which has extended the jurisdiction of the county court left it open to a party, if the sum was above 20*l.*, to sue in the superior court. That right ought not to be construed invidiously. If the party, taking advantage of the law as it stands, sues for a sum just over 20*l.*, and the defendant pays into court 19*l.* 19*s.*, it would be a wrong thing for the plaintiff to go on, and put himself and the other party to the expense of a trial; and yet he would be compelled to do it, in order to get his costs, if the objection on the part of the present defendant were held to be well-founded. It seems to me, therefore, that there is no ground for disturbing what has already been decided, and that the master's allocatur is right." See *Leader v. Leider*, 10 C. B. (N. S.) 369.

(E) *Within what time Plaintiff must apply for Costs.*[2]

(F) *Costs in case of Judgment by Default.*[3]

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diction. *Hatch v. Lewis*, 31 L. J. Ex. 26; 5 L. T. (N. S.) 254.

[1] See *Jordan v. Berwick*, 9 Mee. & W. 3. *Tarrant v. Morgan*, 2 C. M. & R. 252. *Davey v. Renton*, 2 B. & C. 711. But if the plaintiff reply debt or damages *ultra*, and the amount paid into court, together with the sum recovered by the verdict, do not exceed 20*l.*, he will have no costs without an order. *Barnard v. Turner*, 1 Mee. & W. 580.

Where the debt claimed exceeds 20*l.*, but has been reduced below that sum by a set-off, the case is within the statute, and the plaintiff will not have his costs unless he obtain a certificate or order (*Ashcroft v. Foulkes*, 18 C. B. 261. *Rumley v. Irwin*, id. 312; but see *Tonge v. Chadwick*, 5 E. & B. 950; 25 L. J. Q. B. 128), which in the generality of cases will be granted. See *Avards v. Rhodes*, 8 C. B. 312. *Woodhams v. Newman*, 7 id. 654. *Beswick v. Capper*, 7 id. 669. But the case is different if a set-off has been allowed in the plaintiff's particulars, reducing the debt below 20*l.*, for there the debt is admitted within the jurisdiction of the county courts. *Hudspeth v. Yarnold*, 19 L. J. C. P. 321. So if a debt of more than 20*l.* is reduced below that sum by payments before action brought. *Turner v. Berry*, 5 Ex. 858. But if the proof of the payments involve difficult investigations, the judge will set the matter right by granting his certificate. *Turner v. Berry*, *supra*, *per cur.*

[2] No time is limited for the plaintiff to apply for costs. The judge has power to grant the certificate after the trial, and even after the assizes at which the cause was tried. *Bennett v. Thompson*, 6 E. & B. 683; 25 L. J. Q. B. 378. But in the case of a writ of trial the sheriff has no power to certify after he has returned the writ (*Knapman v. Pryer*, 26 L. J. Ex. 143); and the application, whether for the certificate or for a rule or order, must be made before taxation. *Sharratt v. Trevor*, 6 Ex. 673. *Chaplin v. Levy*, 9 id. 673. Should the defendant suffer inconvenience from the plaintiff's delay, it is probable that costs would only be allowed on terms that would recompense him, so far as the court or judge has power, for the loss he may have sustained. *M'Gill v. Milton*, 19 L. J. C. P. 323.

[3] The plaintiff suing in contract for 20*l.*, or less, may in some instances dispense with a summons by indorsing on the writ of summons the following notice:—"Take notice, that if the judgment be signed for default of appearance, the plaintiff will, without summons, apply to a judge for his costs of suit, unless before such judgment you shall give notice to him or his attorney that you intend to oppose such application." Verbal notice of an intention to oppose the application is not sufficient; it must be in writing. *Woodward v. North*, 29 L. J. Ex. 471; 5 H. & N. 790. If such written notice be given, the plaintiff must proceed by summons and order; but if no such notice be given, the plaintiff may produce such indorsement to

VI. Of a Defendant's Right to his Costs of Suit.

(A) *Defendant entitled to Costs if successful.*

Defendant is entitled to costs if successful.

23 Hen. 8, c. 15. "If in any action, bill, or plaint of trespass upon the statute of King Richard the Second for entries into lands and tenements where no entry is given by law, or of debt or covenant upon any specialty made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff or plaintiffs and any other person or persons, or of detinue of any goods or chattels on a supposed right of property, or of account charging the defendant as bailiff or receiver, or upon the case, or upon any statute for any offence or wrong personal immediately supposed to be done to the plaintiff, the plaintiff, after appearance of the defendant, be nonsuited, or that any verdict happen to pass by lawful trial against the plaintiff, the defendant in every such action, bill, or plaint, shall have judgment to recover his costs against the plaintiff, to be assessed and taxed at the discretion of the court; and shall have such process and execution for the recovery and having his costs against the plaintiff as the plaintiff should or might have had against the defendant in case the judgment had been given for the plaintiff."[1]

(B) *Costs where there are several Defendants, and Judgment is recovered against some only.*

Such of several defendants as are successful are entitled to

3 & 4 Wm. 4, c. 42, s. 32, enacts, that "where several persons shall be made defendants in any personal action, and any one or more of them upon the trial of such action shall have a verdict pass for him or them, every such person shall

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a judge at chambers for an order for costs *ex-parte*, and if the judge sign his name to the indorsement it is an order for costs. If the application is made without the indorsement, the plaintiff is not entitled to more costs than if he had made the indorsement, unless a judge otherwise orders. Reg. Gen. East. T. 1857.

[1] The above is the first statute entitling a successful defendant to costs. By the 4 Jac. 1, c. 3, the right to costs was given to defendants in any action "wherein the plaintiff or demandant might have costs in case judgment should be given for him;" under which the defendant is entitled to costs if successful, whether the plaintiff's right to costs is dependent on the Statute of Gloucester or any other act. *Cobbett v. Wheeler*, 30 L. J. Q. B. 64. *Mayor, &c. of Plymouth v. Werring*, Willes, 440. *Greetham v. the Hundred of Theale*, 3 Burr. 1723. So, in case the defendant have judgment on demurrer, he is entitled to the costs. 8 & 9 Wm. 3, c. 11, s. 2; 3 & 4 Wm. 4, c. 42, s. 34; 15 & 16 Vic. c. 76, s. 81. See *Per Parke, B.: Gregory v. Duke of Brunswick*, 3 C. B. 493. And although the defendant may have suffered judgment by default as to one of several causes of action, yet if he succeed at the trial upon issues going to the whole of the remaining causes of action, he will be entitled to the general costs of the trial. *Day v. Hanks*, 3 T. R. 654. *Cross v. Johnson*, 9 B. & C. 613.

But where the defendant has judgment on a plea *puis darreign continuance*, he is not entitled to all the costs of the cause. The costs are to be paid by the plaintiff so far only as the action has been wrongfully prosecuted, namely, since the plea *puis darreign continuance* was pleaded. *Lyttleton v. Cross*, 4 B. & C. 117.

If the defendant plead in abatement, and the plaintiff confesses the plea to be true, and enter a *nil capiat per breve*, the defendant is not entitled to costs (*see* vol. i. p. 41); but if issue be taken on a plea in abatement, and the plaintiff confesses the plea to be true, and the plaintiff afterwards at the assizes have a verdict against him, or is nonsuited, the defendant has costs. Hull, 127. So, if the plaintiff demur to the plea, and the defendant have judgment on demurrer, the defendant has the costs of the demurrer. *Bentley v. Dawes*, 10 Ex. 347. *See* 15 & 16 Vic. c. 76, ss. 36, 37; vol. i. p. 41.

Where there are several defendants who succeed and are entitled to judgment, the court has doubted where there could be separate taxations and separate awards of their costs on the judgment. *Dickens v. Jarvis*, 5 B. & C. 528. *Smith v. Campbell*, 6 Bing. 637), since the plaintiff is entitled to pay the costs to any one of the defendants (*Jordan v. Harper*, 1 Stra. 516. *Duthy v. Tito*, 2 id. 1203), unless it is costs of some interlocutory judgment obtained by one defendant alone. *Showler v. Stokes*, 2 D. & L. 2. But where the defendants have separate attorneys, and defend separately, and obtain a verdict generally, the costs of all need not be taxed at the same time (*Brueford v. Griffin*, 2 L. M. & P. 363); and it is the practice of the masters where there are separate attorneys, to give each a separate allocatur.

costs, unless the judge certify.[1]

have judgment for and recover his reasonable costs, unless the judge before whom such cause shall be tried shall certify on the record, under his hand, that there was a reasonable cause for making such person a defendant in such action."

[1] The statutes of 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, being held to apply only to the case of a verdict for all the defendants in a suit (*Dibdin v. Cooke*, 2 Stra. 1005), the statute 8 & 9 Wm. 3, c. 11, s. 1, first provided for the costs of a defendant, where he was one of several defendants, and acquitted by verdict; but having proved defective, the above enactment of the 3 & 4 Wm. 4, c. 42, was passed.

The defendant who claims costs must satisfy the master that he has himself become liable to the attorney, or in some way responsible for the portion of costs claimed from the plaintiff (*Starling v. Cozens*, 2 C. M. & R. 445. *Gambrell v. Earl of Falmouth*, 5 Ad. & E. 403; 6 Nev. & M. 859. *Norman v. Climenson*, 4 Scott, N. R. 735; 1 Dowl. N. S. 718), and that he is not indemnified by the other defendants. The proper mode of showing this would be by stating it in the affidavit of increase. *See post*, Taxation. *Griffiths v. Kynaston*, 2 Tyr. 757. *Griffiths v. Jones*, 2 C. M. & R. 333.

The rule according to which costs are given is this:— The successful defendant is allowed all his separate costs, and, *primâ facie*, an aliquot part of the joint costs, unless the master is satisfied that some smaller proportion should be allowed by reason of any other special circumstances. *Gambrell v. Earl of Falmouth*, 5 Ad. & E. 403. *Bartholomew v. Stephens*, 5 Mee. & W. 386.

Where the acquitted defendant has incurred separate costs, as by having witnesses whose evidence went to his defence alone, such separate costs ought not to be brought into the general bill of which he is to be allowed an aliquot part, but after the aliquot part of the general bill is ascertained the separate costs should be added to it, and the aggregate allowed as that defendant's costs. *Griffiths v. Kynaston*, 2 Tyr. 257. Where there are two defendants, *primâ facie*, the acquitted defendant is entitled to the half, but the special circumstances will be considered by the master. *Alderson v Waistell*, 2 D. & L. 127. If some defendants defend by one attorney and others by another, and the clients of one attorney are successful and of the other not, the successful defendants are entitled to the whole of their costs. *Griffiths v. Jones*, 2 C. M. & R. 333. Where in reality the defence of all the defendants is conducted by one attorney, but they formally appear by separate attorneys in order to swell the costs, the plaintiff will not be charged with the separate bills of costs, but all will be taxed against him as one bill. *Nanny v. Kenrick*, 2 Dowl. 334. *Gambrell v. Earl of Falmouth*, 5 Ad. & E. 403; 6 Nev. & M. 859. If several defendants defend *bonâ fide* by different attorneys, but at the trial join in one brief and one counsel, and one succeeds and the others fail, the successful defendant is entitled to the whole of his costs, exclusive of half the costs of the brief and counsel. *Bartholomew v. Stephens*, 5 Mee. & W. 386; 7 Dowl. 808. The right of the successful defendant to have his costs is not dependent on his succeeding on all the issues. It is sufficient that he succeed upon one which entitles him to judgment, although, of course, he must pay the costs exclusively applicable to the issue or issues on which he has failed. *Newton v. Holford*, 1 C. B. 141.

Where, in a cause standing for trial, the plaintiff obtains leave to amend by striking out the names of some of the defendants on payment of costs, the remaining defendants having liberty to plead *de novo*, the defendants whose names are struck out are entitled to their entire costs of the cause. But the remaining defendants are only entitled to the costs of the day, if any, because their general costs remain as costs in the cause, and follow the fate of the trial. *Jackson v. Nunn*, 4 Q. B. 209.

Where there are several defendants, and some succeed and others fail in the action, the costs of the successful defendants may, on taxation, be set off against the damages and costs recovered by the plaintiff against the unsuccessful defendants, whether they appeared by the same or different attorneys, or by the same or different counsel, and without regard to the lien of the plaintiff's attorney. Thus, where the plaintiff obtained a verdict against one defendant, but failed as to two others, the court held that the costs of the two defendants were to be deducted from the damages, and costs recovered by the plaintiff, irrespectively of the attorney's lien. *George v. Elston*, 1 Bing. N. C. 513; 3 Dowl. 419. And it has been held that the right of set-off extends to a case where the defendants appeared and pleaded separately, and by several attorneys (*Lees v. Reffit*, 3 Ad. & E. 707; 5 Nev. & M. 340), and that the rule of court (Rule Pr. 63, P. T. 1833) does not apply to such cases. The master, however, would refuse to set off if the defendants entitled to costs objected to it. *Norman v. Climenson*, 4 Scott, N. R. 735; 1 Dowl. N. S. 718.

By 15 & 16 Vic. c. 76, s. 39, "in all cases after a plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant, or any of the original defendants, is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled

VII. Costs of the Day.

(A) *In what Cases payable.*[1]

(B) *How obtained.*[2]

By 15 & 16 Vic. c. 76, s. 99, "a rule for costs of the day for not proceeding to trial pursuant to notice may be drawn upon affidavit without motion."

Reg. Gen. H. T. 1853, r. 39. "The costs of the day for not proceeding to trial, or to execute a writ of inquiry, may be obtained by a side-bar rule on the usual affidavit."

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to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs, as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants, who shall have so pleaded in abatement the non-joinder of such person: Provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."

[1] The plaintiff is liable to the defendant for the costs of the day, if he fail to try the cause pursuant to notice, or if after entering the cause for trial he withdraw the record. *Rex v. Mayor of Great Yarmouth*, 5 B. & A. 531; but see *Mullings v.* ——, 5 Taunt. 88. *Ogle v. Moffatt*, Barnes, 133. But if the plaintiff countermand the notice of trial within the proper time he is not liable. *Whitlock v. Humphries*, 2 Stra. 848. *Cooper v. Boles*, 29 L. J. Ex. 141.

So if a defendant do not proceed to trial by proviso pursuant to his notice, or countermand the same in due time, the plaintiff is entitled to costs. *Wilkinson v. Poole*, 2 Stra. 797.

If the parties, by agreement between themselves, make the cause a remanet, neither are entitled to the costs of the day; but the costs of each will be costs in the cause. *Blow v. Wyatt*, 4 Mee. & W. 407.

And if it were by the fault of both the parties that the cause was not tried, neither will be entitled to the costs of the day. *Warne v. Hill*, 7 C. B. (N. S.) 726. Therefore, if the defendant failed to appear at the trial, he cannot afterwards move for costs of the day: for it was by his own default that any useless costs were incurred, since, if he had attended, he might have nonsuited the plaintiff; and he is, therefore, *in pari delicto*. *Morgan v. Ferryhough*, 11 Ex. 205. See *Newton v. Chaplin*, 7 C. B. 774. So, if some of a special jury, but not enough of them, attend, and neither side praying a tales the case goes off, the default is equal, and neither will be allowed the costs of the day. *Sparrow v. Turner*, 2 Wils. 366.

So, the defendant cannot complain of the case not being tried, or claim the costs of the day, if the cause of its not being tried were some defect or informality, which he might, without prejudice to himself, have waived. *Rainforth v. Harmer*, 3 C. L. R. 298. *Pope v. Fleming*, 1 L. N. & P. 272. *Cook v. Smith*, 1 Dowl. N. S. 861. *Smith v. Gregg*, Barnes, 464. Thus where, upon the cause being called on and the jury sworn, it was discovered that an imperfect record had been made up, and the learned judge who then presided, considering that he had no power to make the amendments without the consent of the defendants, which the defendants refused, was obliged to discharge the jury; it was held that the defendants were not entitled to the costs of the day, since the defendants themselves were the means of preventing the cause being tried by withholding their consent to make the required amendment. *Sleeman v. the Governor, &c. of the Copper Mines of England*, 5 D. & L. 45.

Where, by reason of pressure of business at the assizes, the cause, by the act of the court, is made a remanet, the costs of the case being made a remanet are costs in the cause, and go to the party who ultimately succeeds. *Brett v. Stone*, 1 D. & L. 140. *Gibbons v. Phillips*, 8 B. & C. 437. *Bentley v. Carver*, 2 C. B. 817. *Waters v. Weatherbey*, 3 Dowl. 328. See *Sadler v. Evans*, 4 Burr. 1987. But in *Walker v. Blacklock*, 15 Mee. & W. 715, the party entitled to the general costs in the cause was held not entitled to the cause being made a remanet, on the ground that on the record, as it stood at the first assizes, he would have failed in the action. *Walker v. Blacklock, supra.* And where the cause was made a remanet at the instance of the plaintiff, to admit of a proper view being had by the jury of the *locus in quo*, the court refused to allow the costs of the cause being made a remanet to the defendant, and ordered that they should abide the event. *Lord Mount Charles v. Yorke*, 1 Ld. Ken. 341.

[2] The application for costs of the day could not be coupled with the motion for judgment, as in case of a nonsuit. *Johnson v. Smith*, 1 Dowl. 421. The practice of the court is to grant the rule for costs of the day in the terms in which it is made, and the effect of doing so is simply to send it before the master, who is to say whether there are any costs due or not. *Alderley v. Story*, 2 Dowl. N. S. 335. If the party has omitted to object to their allowance on taxation, the court will not afterwards entertain

(C) *What Costs allowed as Costs of the Day.*[1]

VIII. Costs where some Issues are found for Plaintiff and others for Defendant.

(A) *Costs of Issues follow finding.*

Costs of issues follow finding.

The 15 & 16 Vic. c. 76, s. 81, "provides that the costs of any issue, either of fact or law, shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."[2]

(B) *And where there are Issues of Law and Fact, the Costs follow the Judgment in each.*

And where there are

Reg. Gen. H. T. 16 Vic. c. 2, s. 62. "Where issues of law and fact are raised the costs of the several issues, both in law and fact, will follow the

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the question. *Rainforth v. Harmer*, 3 Com. L. R. 298.

The remedy for costs of the day is by attachment. *Wareing v. Potter*, 2 Andr. 17. If a trial be postponed on terms that the party applying shall pay the costs of the day, it is his business to serve the other party with an appointment to tax the costs; and unless he do so, his opponent may proceed to trial. *Waller v. Joy*, 16 Mee. & W. 60.

[1] In the costs of the day, when paid by the plaintiff, are included all such costs as the defendant may have necessarily incurred by reason of notice of trial having been given; such costs include the resealing of subpœnas, the subpœnaing of witnesses and payments to them when properly made, also refresher fees to counsel when the cause is postponed to another term. In cases of importance and difficulty, and where there is evidently a necessity for a second consultation, the consultation fees to counsel, and the usual attendances upon them, are allowed. Where the defendant has to pay the costs of the day, the same rule applies as to the payment of all costs that have been occasioned by the delay, including such costs for the subpœnas, witnesses, &c. as are allowed to the defendants where the plaintiff is liable, and also the costs of altering and re-entering the record. Marshall on Costs, 125. See *Rushworth v. Wilson*, 1 B. & C. 267. *Matchinson v. Alcock*, 1 D. & R. 165. *Fisher v. Berrell*, 1 Dowl. N. S. 565.

In town causes, the "costs of the day" means only the costs of the last day, when the record is withdrawn, or the cause is made a remanet; but at the assizes, the costs of the day are not confined to the costs of the day when the record is withdrawn, but extend to the whole assizes. Dax. Pr. 101. In *Walker v. Lane* (3 Dowl. 504) the defendant consented to allow the postponement of the trial on payment of the costs of the day by the plaintiff, and it was accordingly, by leave of the judge, postponed, and was again put into the paper, and remained three days on the list before it was tried, when the plaintiff obtained a verdict. On the taxation of the costs of the day, it was contended by the defendant that he was entitled not only to the usual costs of the day, but also to the costs of the three days during which the cause was in the paper, because it was alleged that the delay, and the expense consequent thereon, had been caused entirely by the postponement. The master refused to allow the expense of the three days, and the court held that he was right, and that the plaintiff ought not to be in a worse position than if he had withdrawn the record.

Where the costs of the cause, being made a remanet, are costs in the cause, the successful party is entitled to the expense of necessary witnesses unavoidably detained while the cause stood over. *Morrison v. Harmer*, 5 Scott, 410.

The costs of an application to the judge at *nisi prius* to fix a particular day for the trial, are not included in the costs of the day. *Morgan v. Miller*, 1 Man. & G. 828. *Morrison v. Harmer*, 5 Scott, 440.

[2] This enactment cannot apply where the issue is single. *Cazneau v. Morrice*, 25 L. J. Q. B. 126. If the defendant plead several pleas, for example, the general issue and pleas of justification, and he have judgment on the general issue, and the plaintiff on the pleas of justification, or if the defendant has judgment on one of the pleas of justification going to the whole cause of action, and the plaintiff has judgment on the general issue, the defendant is entitled to the costs of the cause, and the plaintiff to the costs of the issues on the pleas on which he succeeded. *Hart v. Cutbush*, 2 Dowl. 456. *Skinner v. Shoppee*, 6 Bing. N. C. 131. In addition to the enactment cited in the text, the 4 Anne, c. 16, s. 5, gives the plaintiff costs in such a case, unless the judge who tries the issue shall certify that the defendant had probable cause to plead such matter as upon the issue shall be found against him. *Dodd v. Joddrel*, 2 T. R. 235. *Fry v. Monkton*, 9 Dowl. 967. *Robinson v. Messenger*, 8 Ad. & E. 606. *Cobbett v. Gray*, 19 L. J. Ex. 137. *Daniel v.*

finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any particular issue, he will be entitled to the general costs of the trial; but if no material issue be found for the party otherwise entitled to the general costs of the cause, the costs of the trial will be allowed to the opposite party."

Issues of law and fact, the costs follow the judgment in each.

(C) *Single Issues may be taken Distributively for the purposes of Costs.*[1]

By 15 & 16 Vic. c. 76, s. 76, "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue[2] is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved, shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall not be so answered."

Single issues may be taken distributively for the purposes of costs.

Barry, 4 Q. B. 59. *Harrison v. Bush*, 5 E. & B. 358. *Nicholson v. Dyson*, 11 Mee. & W. 545. This certificate is rarely granted, since it is considered but just that where the defendant has put the plaintiff to unnecessary expense by pleading that which turns out, either in law or fact, to be unfounded, he should recover that expense to the plaintiff, although he may be successful on the general question. *Spencer v. Hamerton*, 4 Ad. & E. 413. *Duberley v. Page*, 2 T. R. 394. *Hart v. Cutbush*, 2 Dowl. 456.

[1] If there are issues both of fact and law, as where there are several pleas and the plaintiff demurs to one and takes issue upon others, or replies, and issue of fact is ultimately joined, or where the defendant both demurs and pleads to the declaration, the costs of the demurrer go to the party who succeeds upon it, although he may fail on the issues of fact, and the costs of the trial of the issues of fact go to the party who succeeds upon such trial, although he may fail on the issue of law. Thus, if the plaintiff has judgment on demurrer to the declaration, and fail on the trial of issues of fact raised on the defendant's pleas, the plaintiff is entitled, notwithstanding the defendant has judgment on the whole record, to the costs of the demurrer. *Bentley v. Dawes*, 10 Ex. 347. So, if there are several pleas, and to one of them the plaintiff demur, and issues of fact are raised by the others, and the plaintiff has judgment on the demurrer to the plea, and the defendant has judgment on the issues of fact, the plaintiff is entitled to the costs of the demurrer, and such costs will be deducted from the defendant's costs of the cause. *Greenhow v. Ilsley*, Barnes, 136. *Duberley v. Page*, 2 T. R. 391. If, instead of trying the issues of fact, the plaintiff, after the demurrer is determined in his favour, discontinue, he is equally entitled to the costs of the demurrer. *Elwood v. Bullock*, 6 Q. B. 383. And if the defendant has judgment on the issue of law, and fails on the issue of fact, he is entitled to the costs of the demurrer. *Scott v. De Richebourg*, 1 C. B. 447. *Yates v. Gunn*, Barnes, 141. See *Cook v. Sayer*, 2 Burr. 753.

The effect of the rule of court cited in the text (16 Vic. c. 2, s. 62) is, that if the party entitled to the general costs of the cause succeed on any one issue at the trial, although such finding for him would not, but for the judgment on the issue of law, have made him the successful party on the trial of the issues of fact, he will be entitled to the general costs of the trial, while the other party, although really successful on the trial, will only have the costs exclusively applicable to the specific issues upon which he has succeeded; but if the party entitled to the general costs of the cause fail on all the issues of fact, then all the costs of the trial will go to the party succeeding thereon. Thus, if there be two pleas to one count, and on one issue of fact is joined, and the plaintiff demurs to the other, and the issue of fact being tried first the plaintiff has judgment, and the defendant afterwards has judgment upon the demurrer, the plaintiff is entitled to the general costs of the trial; that is, not only the costs of the pleadings, but the costs of the witnesses of the *nisi prius* record and jury, briefs, counsels' fees, and all other expenses incidental to the trial. *Bird v. Higginson*, 5 Ad. & E. 83. *Yates v. Gunn*, Barnes, 141. But if in a like case of two pleas to one declaration the defendant were to succeed on the former plea and the plaintiff on the latter, there it is evident the defendant is the successful party at the trial. Yet if the plaintiff afterwards have judgment on the demurrer he will, by virtue of the rule of court, be entitled to the general costs of the trial, and the defendant will only have the costs, if any, exclusively applicable to the issue on which he succeeded. See *Smith v. Hartley*, 11 C. B. 678.

[2] In construing the word "issues," with reference to the rule that costs shall follow the finding upon them, it has been held that where the single plea of not guilty or *non assumpsit* has been pleaded to any number of counts, it raises as many distinct issues as there are counts, the single plea being treated as divisible, and substantially pleaded to each count by itself. *Cox v. Thomason*, 1 Dowl. 572. *Knight v. Brown*, id. 730. Further, a single count may be divisible according to the several allegations,

IX. Costs in Case of Pleadings founded on same Subject-matter.

(A) *Must be borne by Party pleading if the Judge certify.*

Costs of several pleadings on same matter must be borne by party pleading, if the judge certify.

Reg. Gen. (Pl.) H. T. 1852, r. 1, provides, "Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts in violation of this rule may, on the application of the party objecting, within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a judge, on such terms as to costs or otherwise as such court or judge may think fit. Several pleas, replications, or subsequent pleadings, or several avowries or cognisances founded on the same ground of answer or defence, shall not be allowed; provided that on an application to the court or a judge to strike out any count, or on an objection taken before the judge on a summons to plead several matters, to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognisances, on the ground of such counts or other pleadings being in violation of this rule, the court or the judge may allow such counts on the same cause of action, or such pleas, replications, or subsequent pleadings, or such avowries or cognisances founded on the same ground of answer or defence, as may appear to such court or judge to be proper for the determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise as the court or judge may think fit."

By r. 3. "When no such rule or order has been made as to costs by the court or judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognisance on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record; the party so pleading shall be liable to the opposite party for all costs occasioned by such counts, plea, or other pleading, in respect of which he has failed to establish a distinct cause of action, or distinct ground of answer or defence, including those of the evidence as well as those of the pleading."

X. Of the General Costs in the Cause.

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containing each a separate cause of action, so that the general issue pleaded singly to the whole may be considered to raise a number of distinct issues to the number of such allegations. *Doe v. Errington*, 4 Dowl. 602. Thus, if in one count the plaintiff complains of trespasses to different closes, the verdict may be entered for the plaintiff as to the trespass to the one close and for the defendant as to the other, although the pleas are general to the whole count. It is to be treated as if it were a separate action for the trespasses in each close, and consequently the plaintiff is entitled to have the costs of the issues found for him as to the one close taxed, but he is entitled to no costs as to the other. *Sharland v. Loaring*, 1 Ex. 375. *Phythian v. White*, 1 Mee. & W. 216. So, in ejectment, where several messuages are claimed. *Doe v. Errington*, 4 Dowl. 602. *Doe v. Lewis*, 13 Mee. & W. 241. So, in trespass for breaking the plaintiff's house and carrying away his goods, and the defendant pleads a justification as to all, but fails with respect to some of the goods. *Routledge v. Abbott*, 8 Ad. & E. 592. So, in trover, the issue may be entered distributively, and in an interpleader issue (*Lewis v. Holding*, 2 Man. & G. 875. *Staley v. Bedwell*, 10 Ad. & E. 145. See *Elliott v. Bishop*, 10 Ex. 522. *Williams v. Great Western Railway Co.* 8 Mee. & W. 856); and it has even been so entered in an action of libel, where a variety of distinct libels were set out in the declaration. *Prudhomme v. Frazer*, 2 Ad. & E. 645.

If, however, the plaintiff is proceeding for one entire cause of action, he will be entitled to a general verdict, although he does not succeed to the extent of his claim, and the defendant cannot deduct costs occasioned by a larger allegation of damages than the plaintiff succeeds in establishing. As where the plaintiff recovers for the breach of one entire contract, and he fails in proving one alleged breach, but recovers as to another, the issue cannot be taken distributively. *Anderson v. Chapman*, 5 Mee. & W. 483. See *Bird v. Penrice*, 6 id. 745. *Delisser v. Towne*, 1 Q. B. 333. As to the entering the verdict distributively on pleas, see *Nicholson v. Dyson*, 11 Mee. & W. 545. *Knight v Woore*, 3 Bing. N. C. 534. *Daniel v. Barry*, 4 Q. B. 59.

(A) *Who entitled to them.*[1]

(B) *What included in.*[2]

XI. Costs of Demurrers.

(A) *The Costs of a Demurrer follow the Judgment upon the Demurrer.*

3 & 4 Wm. 4, c. 42, s. 3. "When judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

The costs of a demurrer follow the judgment upon the demurrer.[3]

[1] If the plaintiff has succeeded on any part of his declaration (*Smith v. Edwards*, 4 Dowl. 621), *i.e.* if the pleas on which issues are found for the defendant do not answer the whole of the cause or causes of action in the declaration, then the plaintiff generally is entitled to the *postea*, and has the general verdict. *See ante*, p. 302. As an established rule, the party who has the general verdict is entitled to the entire costs (*Frankum v. Lord Falmouth*, 4 Dowl. 65. *Probert v. Phillips*, 2 Mee. & W. 40. *Mullins v. Scott*, 5 Bing. N. C. 423. *Knight v. Moore*, 3 id. 534); or if there be no verdict the party is entitled who, in the general result of the action, is successful. *Benn v. Bateman*, 8 M. & W. 666. *See* 1 Saund. 300, a.

[2] The general costs include all the costs necessarily incurred by the successful party in establishing his case. The costs of issues are those extra costs incurred by the opposite party in consequence of the successful party having included counts which involved no defence. *Nurse v. Ray*, 6 L. J. Ex. 151. *Newton v. Holford*, 1 C. B. 141.

Costs of all interlocutory proceedings, which are not otherwise provided for, are costs in the cause. *Pugh v. Kerr*, 8 Dowl. 218. But the costs of applications and proceedings collateral to the suit are not costs in the cause, unless ordered to be so; as, an application to discharge a defendant arrested on a *capias*. *Mummery v. Camp*, 4 id. 798. The costs of an abortive effort to refer the cause to arbitration are not costs in the cause. *Gribble v. Buchanan*, 18 C. B. 671. *Doe v. Morgan*, 4 Mee. & W. 171. The costs of the suit being made a remanet by reason of pressure of business at the assizes, are costs in the cause. *Gibbons v. Phillips*, 8 B. & C. 437. *Bentley v. Carver*, 2 C. B. 817.

If a cause be removed from an inferior court, the costs in the court below are costs in the cause.

Where a cause has been referred to an arbitrator, and witnesses examined before him to prove the issues, the costs in the cause are the costs up to the time of the reference. *Brown v. Nelson*, 13 Mee. & W. 397. But, where a cause was referred to an arbitrator to settle a special case, the costs of the action to abide the event of the award, the costs of attendances before the arbitrator to settle the case were held to be costs in the cause. *Edwards v. Great Western Railway Co.* 12 C. B. 419. Reg. Gen. H. T. 1853, r. 117.

The costs of successfully opposing a rule for a new trial are costs in the cause. *Eyre v. Thorpe*, 6 Dowl. 768. See *Southee v. Terry*, 2 id. 522. If, after a verdict for the plaintiff, the defendant move to set it aside or reduce the damages, and succeed on the latter part of the motion, the plaintiff will not be entitled to the costs as costs in the cause, unless he has given notice to the defendant that he consents to the damages being reduced. *M'Andrew v. Adams*, 3 id. 120. *Spitta v. Woodman*, 3 Taunt. 406. See *Delisser v. Towne*, 1 Q. B. 333. *Foley v. Botfield*, 16 Mee. & W. 65.

The costs of proceedings in error are taxed, and allowed as costs in the cause. Reg. Gen. (Pr.) H. T. 1853, r. 68; Pr. r. 25. *Fisher v. Bridges*, 4 E. & B. 666. *Marshall v. Jackson*, id. 669, n. a.

It may happen, however, that the party entitled to the general costs of the cause is not entitled to the general costs of the trial. "When issues in law and fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment; and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial: but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party." Reg. Gen. (Pr.) H. T. 1853, r. 62.

[3] *See* also 8 & 9 Wm. 3, c. 11, s. 2. Though the object of the 3 & 4 Wm. 4, c. 42, s. 3, was to provide for cases not included in the 8 & 9 Wm. 3, c. 11, s. 2, which had been construed not to extend to any cases except where the plaintiff would have recovered his costs if he had recovered, its terms are so general that there seems to be no question that it gives a right to a judgment and costs in all cases of demurrer. *Per Parke, B.: Gregory v. Duke of Brunswick*, 3 C. B. 493. *Cannon v. Rimmington*, 12 id. 514. Besides these statutes, the 4 Anne, c. 16, allowing several matters to be pleaded, provides in s. 5 that "if any such matter shall, upon a demurrer joined, be judged insufficient, costs shall be given at

XII. Costs of Interlocutory Proceedings in a Suit.

(A) *Application to Judge at Chambers.*[1]

The costs of making a judge's order a rule of court are payable by the party whose disobedience has rendered it necessary.[2]

Reg. Gen. (Pr.), H. T. 1853, r. 159. "When a judge's order or rule of *nisi prius* is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed."

(B) *Costs of Rule where Application made to the Court.*[3]

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the discretion of the court." And by the 15 & 16 Vic. c. 76, s. 81, "the costs of any issue, whether of fact or law, shall follow the finding or judgment on such issue, and be adjudged to the successful party, whatever may be the result of any other issue or issues."

If after the plaintiff has judgment on demurrer he discontinue the action, he is entitled to the costs of the demurrer, and the defendant to the costs of the discontinuance. *Mayor of Macclesfield v. Gee*, 13 Mee. & W. 471. And the plaintiff has the costs of a demurrer decided in his favour before the trial, although at the trial a juror is withdrawn by consent. *Bentley v. Dawes*, 10 Ex. 347. *Burden v. Flower*, 7 Dowl. 786, *contrà*.

The statutes depriving plaintiffs of costs where the damages do not exceed 40s., do not apply to the assessment of damages on a judgment on demurrer. *Taylor v. Rolfe*, 5 Q. B. 337. The County Courts Acts, however, apply in cases within the exclusive jurisdiction to deprive a plaintiff of his costs, not only of issues of fact, but also of the costs of issues of law. *Abley v. Dale*, 11 C. B. 889; 21 L. J. C. P. 104.

If the demurrer go to the whole action, the successful party may sign judgment, and tax his costs in the ordinary way; but if the demurrer be only to a part of the pleadings, the costs cannot be taxed until the final result of the cause be ascertained, as there can be but one taxation of costs. Where, however, the court gives leave to a party to amend his pleadings after demurrer delivered upon payment of costs, the costs may be taxed at once. Dax. 91.

By Reg. Gen. (Pr.), H. T. 1853, r. 17, it is ordered, "when there shall be a demurrer to part only of the declaration, or other subsequent pleading, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer books, and if any other parts shall be copied, the master shall not allow the costs thereof on taxation either as between party and party, or as between attorney and client." See *Jones v. Roberts*, 2 Dowl. 374.

[1] In general, applications of an interlocutory nature ought, and, indeed, in many cases, must be made to a judge at chambers, where they are disposed of with greater speed, equal satisfaction, and infinitely less cost than if made to the court. If made to the court in a case where an application at chambers would have equally answered the purpose, the court will in general either not give any costs, or only such as the party would have got if the application had been made to a judge at chambers. Dax. Pr. 108. See *Warman v. Halahan*, 30 L. J. Q. B. 48.

A judge at chambers has power over the costs of applications made to him there. *Doe d. Prickett v. Roe*, 9 Bing. 104. *Bridge v. Wright*, 2 Ad. & E. 48. As where a declaration is irregular, he may set it aside with costs (*Hughes v. Brand*, 2 Dowl. 132); or in ordering that the plaintiff shall deliver particulars of his demand, he may require him to pay the costs of the summons. *Clement v. Weaver*, 3 Man. & G. 551. The costs of attendance by counsel or special pleader at chambers are in no case allowed, as between party and party, unless the judge certifies for such allowance. Reg. Gen. H. T. 1853: Directions to Masters.

The court will not, except in a very extreme case, review the exercise of the judge's discretion, either where he has ordered that the costs of the application shall be paid by the one party to the other, or where, having considered the point, he has refused to make any order as to costs. *Read v. Lee*, 2 B. & Adol. 415. *Sheriff v. Gresley*, 5 Nev. & M. 491. *Spicer v. Todd*, 1 Dowl. 306. *Davey v. Brown*, 1 Bing. N. C. 460.

Where the judge directs the costs of the order to be paid, he may fix the amount that shall be paid, if, to save expense, he is willing to do it. *Collins v. Aron*, 4 Bing. N. C. 233.

[2] This rule applies, although the party against whom the rule is made is an infant. *Collins v. Johnson*, 16 C. B. 588. If the party against whom it is made has, in point of fact, not disobeyed the order, he is entitled to apply to the court that the part of the rule ordering that he should pay the costs may be set aside. *Re Farrant v. Goderich*, 21 L. J. Q. B. 272.

[3] There is no invariable principle with regard to the allowance or disallowance of costs of motion in courts of law. Costs on such occasions are often arbitrary, and rest entirely in the discretion of the court upon weighing all the circumstances, not only as to the *quantum*, but whether there shall be any costs at all. Hull. L. of C. 624. There are, however, certain rules, according to which the court imposes the costs of an application upon one party or the

(C) *Costs of setting aside Proceedings for Irregularity.*

Reg. Gen. (Pr.), H. T. 1853, r. 137. "In all cases where a rule has been obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is to be understood as discharged with costs."

If rule *nisi* with costs discharged generally, it is discharged with costs.[1]

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other in cases in which it does not consider it proper by silence to leave the costs to be costs in the cause. And there is this distinction, that if nothing be said about costs in the rule, or by the court making it absolute or discharging it, they are considered as costs in the cause, and must be paid by the party ultimately prevailing if the rule be made before judgment, but if it be not made till after judgment, the costs depend entirely on the rule, and if it be silent concerning them, each party must pay his own costs. Id. 625. *Anon.* 1 Chit. 398.

It is, however, a general practice with regard as well to the costs of a rule as of an order, that if the proceedings are regular, and the application to stay or set them aside is made to the favour and indulgence of the court, the payment of costs by the party applying is generally a condition of making the rule absolute. If, upon showing cause, it appear that there was no ground for the application, the rule will be discharged with costs, to be paid by the party who obtained it. But if there was any ground for the rule, and it is not drawn up with costs, the court will in general discharge it without costs, or they will sometimes direct the costs to abide the event of the suit. Hull. L. of C. 624. *Dunn v. Loftus*, 8 C. B. 81. See *per Wilde, C. J.*

And if a party obtain a rule to show cause requiring two things *with costs*, although he be entitled to one, yet if he fail as to the other he shall not have costs, for the adverse party was under the necessity of coming into court to resist the latter. *Lewis v. Holding*, 2 Man. & G. 884. *Duke of Brunswick v. Sloman*, 5 C. B. 21. *Oliver v. Furnival*, 2 Dowl. 49. *Ward v. Ducker*, 2 Scott, N. R. 45. Gray on Costs, 481.

And if the court order a matter substantially different from that claimed by the rule *nisi*, which asks for costs, as where the plaintiff seeks to strike out a plea and the court orders that it shall be amended, the plaintiff shall not have costs if the rule absolute is silent on the subject. *Barnes v. Hayward*, 1 H. & N. 242. *See* also *Doe d. Tansey v. Roe*, 1 Bing. 40.

As to the costs of amendments, *see* vol. i. p. 338.

If, in consequence of notice of an intended motion, a party appear to show cause in the first instance, the court will not give him costs, although they should refuse to grant any rule, for it was in the party's election to appear or not in the first instance; and if, for the sake of expedition, he make his option to appear immediately and oppose the granting of any rule at all, he purchases that expedition at the expense of his costs. *Waldron v. Morris*, 1 W. Black. 769. *Fitch v. Green*, 2 Dowl. 439. *Poole v. Watson*, 1 Jur. 71. *Read v. Speer*, 5 Dowl. 330. *Gerrard v. Gaskell*, 2 Chit. 401. *Warne v. Bickford*, 9 Price, 14. *See* 16 C. B. 497; 16 Man. & G. 355.

Unless a rule ask for costs, it cannot be made absolute with costs. *Gleddon v. Treble*, 9 C. B. (N. S.) 367; 30 L. J. C. P. 160.

Where a thing is allowed to be done by a rule or order "upon payment of costs," that in general means, that if he avail himself of the liberty he shall in the first place pay the costs. He may do it, provided he pay the costs; for the words "upon payment of costs" do not amount to a direction to pay, or an undertaking to pay. *Pugh v. Kerr*, 6 Mee. & W. 17. *Scarrall v. Horton*, 3 Barnes, 283. *Fricker v. Eastman*, 11 East, 321. *Price v. Philcox*, 7 Dowl. 559. But if these words are coupled with matters which from the nature of them show that it could not have been intended to leave any option to the person against whom the order is made, then they will be construed as words of agreement, and imposing an obligation of performance. *Horton v. Westminster Improvement Commissioners*, 21 L. J. Ex. 325. And in a penal action, an order to stay proceedings "upon payment of costs" is obligatory. *King v. Clifton*, 5 T. R. 257. And if the order be to do one or more things, *and* to pay the costs, the words are compulsory, and the order must be obeyed. *Crowther v. Crowther*, 16 C. B. 177. If the order be conditional, and the party has availed himself of the liberty without paying the costs, as he ought in the first instance to have done, the order may be rescinded upon the application of the opposite party, and then the proceedings under the order will be irregular; but the court cannot order an attachment against him for non-payment of the costs. *Turner v. Gill*, 3 Dowl. 30. *Rose v. Fenn*, 2 Dowl. 182.

As to costs of rule or order to change the venue, *see post*, Venue.

[1] See *Lloyd v. Hawkyard*, 1 M. & Rob. 320. If the irregularity complained of is trivial, and such as could readily be set right by a judge at chambers, the court will discharge a rule to set aside the proceedings *without costs*, making them, therefore, costs in the cause, and leave the party to apply at chambers to have the irregularity amended. *Skin v. Plovin*, 5 Dowl. 594. *Roberts v. Lemon*, 6 Scott, 576. See *Duke of Brunswick v. Sloman*, 5 C. B. 218.

XIII. Security for Costs.

(A) *Where Plaintiff is Resident out of Jurisdiction.*[1]

(B) *Security for Costs where Plaintiff becomes Bankrupt or Insolvent.*[2]

[1] If the plaintiff reside out of the jurisdiction, and have no property within it available under an execution, in case the defendant should succeed, and so become entitled to costs, the defendant is entitled to require the plaintiff to give security for costs in case he should further prosecute the action. *Pray v. Edie*, 1 T. R. 267. The mere circumstance that the plaintiff is a foreigner is not a sufficient ground for calling upon him for security, unless he is resident abroad. If he is living within the jurisdiction at the time the application for security is made, it will not be granted, although he has only come to this country, and there is probable reason to suppose that his residence in it is for a temporary purpose only, unless he has a permanent residence abroad to which he is about shortly to return. *Drummond v. Tillinghurst*, 16 Q. B. 740. *Tambisco v. Pacifico*, 7 Ex. 816. *Anslie v. Sims*, 22 L. J. Ch. 834. *Oliver v. Johnson*, 5 B. & A. 908. *Cerugno v. Hassan*, 6 Taunt. 20. *Dowling v. Harmar*, 6 Mee. & W. 131. *Anon.* 8 Taunt. 737. *St. Leger v. Nuovo*, 2 Scott, N. R. 587. As to *qui tam* actions, *see* 11 Ir. C. L. Rep. 26.

A foreigner, the captain of a foreign ship trading to this country, may be required to give security, unless he has a place of residence here. *Nylander v. Barnes*, 6 H. & N. 509; 30 L. J. Ex. 151. And where the security is required from an Englishman who is abroad, it lies on the defendant to show that the plaintiff has not gone abroad for a temporary purpose merely. *Harmer v. Mangles*, 12 Mee. & W. 313. *Taylor v. Fraser*, 2 Dowl. 622. *Blakeney v. Dufaur*, 22 L. J. Ch. 389. *Edinburgh and Leith Railway Co. v. Dawson*, 7 Dowl. 576.

British officers or privates serving abroad in the army or navy will not be required to give security when they sue while so abroad, for, in such a case, the foreign residence is involuntary. *Whittall v. Campbell*, 5 H. & N. 601. *O'Lawler v. Macdonald*, 8 Taunt. 736. *Evering v. Chiffenden*, 7 Dowl. 536. *Garwood v. Bradburn*, 9 Dowl. 1031. And so if in a civil capacity under a commission of her Majesty. *Lord Nugent v. Harcourt*, 2 id. 578. But if there are several plaintiffs, security cannot be required if any one of them reside within the jurisdiction. *Kilkenny and Great Western Railway Co. v. Fielden*, 8 Ex. 86. *Thomel v. Roelandts*, 2 C. B. 290. But a domiciled Irishman serving in the army in Ireland is not exempt from the necessity of giving security if he sue in England. *Chappell v. Watts*, 29 L. J. Q. B. 167.

A foreign plaintiff may be required to give security for costs in error. *Bonglieux v. Swayne*, 3 E. & B. 829. *Cooper v. Slade*, E. & E. 336.

Peers are privileged from giving security for costs, although they are resident abroad when they sue. *Earl Ferrars v. Robins*, 2 Dowl. 636. Nor can ambassadors suing while here, although, by a fiction of the *jus gentium*, considered as still resident in the state from which they have been sent. *Duke of Montillano v. Christin*, 5 M. & S. 503. A foreign sovereign, however, who sues in the courts of this country in respect of commercial transactions in which he has engaged, is not privileged from giving security for costs. *The Emperor of Brazil v. Robinson*, 6 Dowl. 522. *Otho King of Greece v. Wright*, id. 12.

Notwithstanding the plaintiff is resident abroad, he will not be required to give security for costs if he has property of a permanent character within the jurisdiction sufficient in amount to answer the probable costs in case the defendant should defeat the action. *Swinbourne v. Carter*, 23 L. J. Q. B. 16. See *Bristow v. Needham*, 4 Man. & G. 906. The property must be of a real character, such as lands or houses; money and exchequer bills, although they may be taken in execution, are not of a sufficiently permanent nature. *Edinburgh and Leith Railway Co. v. Dawson*, 7 Dowl. 576. In an action by a joint-stock company, established out of the jurisdiction, the circumstance that the shareholders reside within it does not absolve them from giving security. *Kilkenny and Great Western Railway Co. v. Fielden*, 6 Ex. 81.

[2] The poverty of the plaintiff affords no reason for requiring him to give security for costs. *Ross v. Jaques*, 8 Mee. & W. 135. *Armitage v. Crafton*, 1 B. C. R. 30. But the court will, where the plaintiff is a bankrupt or insolvent, and the action is really the suit of his assignees, require that security for costs shall be given to the defendant, because the assignees are taking advantage of a state of things which gives no remedy to the other side for their costs. *Webb v. Ward*, 7 T. R. 296. *Mason v. Polhill*, 2 Dowl. 61. *Denton v. Williams*, 8 id. 123. If the bankruptcy of the plaintiff might be pleaded, the court will impose as a condition that the defendant should not plead his bankruptcy. *Manly v. Mayne*, 3 M. & R. 381. *Alexander v. Townley*, 4 Man. & G. 772. And by the 15 & 16 Vic. c. 76, s. 142, it is enacted, "the bankruptcy or insolvency of the plaintiff in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof upon a judge's order, to be obtained for that purpose within such reasonable time as the judge may order; but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the

(C) *Where the Action is by a Nominal Plaintiff,*[1] *or Joint-Stock Company.*[2]

(D) *The Application for Security.*

Reg. Gen. (Pr.), H. T. 1852, r. 22. "An application to compel a plaintiff to give security for costs must in ordinary cases be made before issue joined." Must be made before issue joined.[3]

(*a*) *Form of Demand of Security.*[4]

(*b*) „ *Affidavit.*[5]

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order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy." If the assignees refuse to proceed with the action, and the bankrupt is the real and not the nominal party, the court will not require him to give security for costs. *Beckham v. Knight*, 6 Dowl. 227. *Walkingshaw v. Marshall*, 7 Tyr. 993. *Snow v. Townsend*, 1 Marsh. 477. *Wray v. Brown*, 6 Bing. N. C. 273. *Stead v. Williams*, 5 D. & L. 497. *Andrews v. Morris*, 7 Dowl. 712.

[1] If the plaintiff is really suing for the benefit of another, and his circumstances are so indigent as to afford an insufficient security for the defendant's costs, the defendant may call upon him, and not the party behind, to give security for costs, and that will probably bring the real party forward. *Evans v. Rees*, 2 Q. B. 340. *Goatley v. Emmett*, 15 C. B. 1087. *Elliott v. Kendrick*, 12 Ad. & E. 597. *Perkins v. Aldcock*, 3 D. & L. 270. *Gell v. Curzon*, 4 Ex. 813. *Haygarth v. Wilkinson*, 12 Q. B. 851. *Wray v. Brown*, 8 Scott, 557. The mere circumstance that the plaintiff has assigned his interest in the debt sued for by way of mortgage is not enough. *Parker v. Great Western Railway Co.* 19 L. J. C. P. 335. Nor that he has compounded with his creditors, unless the suit is for their benefit (*Thomel v. Roelandts*, 2 C. B. 290), nor that he has brought the action at the instigation of another (*Hearsay v. Pechell*, 5 Bing. N. C. 466), unless such other is interested in the subject-matter of the suit. *Tenant v. Brown*, 5 D. & L. 280.

Except in ejectment, a stranger to the suit cannot be called upon to give security for costs. *Evans v. Rees*, 2 Q. B. 334. *Mair v. Macnamara*, 5 Ex. 267. *Berkeley v. Dimerley*, 10 B. & C. 113, n. *Hayward v. Giffard*, 4 Mee. & W. 195.

In replevin the defendant is virtually the plaintiff, and he may be required to find security for costs under the same circumstances in which a plaintiff in other actions may be called upon to do so. *Selby v. Crichley*, 1 B. & B. 505. *Ford v. Stock*, 1 Dowl. N. S. 763. But the defendant cannot in other actions be required to give security: yet a defendant below, who is plaintiff in error, and resides out of the jurisdiction, may be so required. *Lewis v. Ovens*, 4 B. & A. 265.

[2] Where a joint-stock company with limited liability sues, they may be required to find security for costs, if there be reason to apprehend that the assets of the company are insufficient to answer the defendant's costs. 20 & 21 Vic. c. 14, s. 24.

[3] It is incumbent on the defendant to make the application within a reasonable time after the fact of the plaintiff's being out of the jurisdiction has come to his knowledge, and not to allow the plaintiff to pay fees and incur costs. See *Dowl v. Harman*, 6 Mee. & W. 131. *Fletcher v. Law*, 3 Ad. & E. 551. *Gurney v. Kay*, 3 Dowl. 559. *Edinburgh and Leith Railway Co. v. Dawson*, 7 Dowl. 573. *Montellano v. Garcias*, 1 Bing. 67. *Muller v. Gernon*, 3 Taunt. 273. And he must take no step after he knows that the plaintiff is out of England before applying for security. *Duncan v. Stint*, 5 B. & A. 702. *Doe d. Somes v. Broad*, 1 Dowl. N. S. 857. *Fry v. Wills*, 3 Dowl. 6. *King of Greece v. Wright*, 6 id. 12.

[4] Application ought to be made to the plaintiff or his attorney before moving for a stay of proceedings till security for costs shall be given; if the motion is made without such previous application, the rule will be absolute only *upon payment of costs*. *Fletcher v. Law*, 3 Ad. & E. 551. *Baillie v. De Bernales*, 1 B. & A. 331.

Form of Demand of Security.

I hereby require of the plaintiff to give the defendant in this action security for the payment of the defendant's costs, otherwise I shall apply to the court for a rule to compel him to do so. Dated, &c.

[5] *Form of Affidavit.*

In the Q. B. [*or* C. P. *or* Exch. of P.]

Between A. B. plaintiff,
and
C. D. defendant.

I, C. D., of the above-named defendant, and I., D. A., of gentleman, his attorney, make oath and say,—

(1.) I, C. D., say that the said plaintiff's residence is in the dominion [*or* kingdom] of and that the said plaintiff now resides there.

(2.) And I, D. A., for myself, say that an appearance was duly entered for the said defendant in this action, and issue has not been joined therein; and I did on the day of last, for and on the part of the said defendant, demand of P. A. gentleman, the attorney of the above-named plaintiff in this action, security for the costs of this action, but the said P. A. refused to give any such security, and I did thereupon, on the said day of last, serve the said P. A. with a true copy of the notice hereunto annexed, by delivering such copy to the said P. A. at his chambers, in &c.

(*c*) *Form of Condition in the Bond given as Security.*[1]

XIV. The Bill of Costs and its Delivery. *See* vol. ii. p. 43.

XV. The Reference of the Bill to Taxation. *See* id. p. 47.

XVI. Of the Taxation of Costs.[2]

(A) *Of the Notice of Taxation*[3] *and Appointment to Tax.*

One day's notice of taxation must be given,[4]

Reg. Gen. H. T. 1853, r. 59. "One day's notice of taxing costs, together with a copy of the bill of costs, and affidavit of increase (if any), shall be given by the attorney of the party whose costs are to be taxed, to the other party or his attorney, in all cases where a notice to tax is necessary."

and an appointment made.[5]

Rule 60. "One appointment only shall be deemed necessary for proceeding in the taxation of costs, or of an attorney's bill."

Attendance on appointment.

Rule 154. "An attendance on a summons or an appointment before a master for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance."

Rule 172. "On every appointment made by the master, the party on whom the same shall be served shall attend such appointment without waiting for a second, or in default thereof the master may proceed *ex-parte* on the first appointment."

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[1] *Form of Condition in the Bond given as Security.*

Whereas an action hath been commenced, and is now depending in her Majesty's court of at Westminster, wherein the said A. B. is the plaintiff, and the above-named C. D. is the defendant, and all proceedings in the said action are stayed until security be given for the defendant's costs therein: Now, therefore, the condition of the above-written bond or obligation is such that if the above bounden A. B. and E. F. or either of them, they or either of their heirs, executors, or administrators, do pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, such costs as the said A. B. or any other person or persons made or substituted as plaintiff or plaintiffs in the said action, shall in due course of law be liable to pay in case he or they shall discontinue, become nonsuit, or a verdict shall pass against him or them in the same, such costs to be first taxed by one of the masters in the usual manner, or in case of a judgment obtained by the said C. D. or any other person or persons made or substituted defendant or defendants in the said action for his or their costs, then the above obligation to be void, otherwise to be and remain in full force and effect.

The bond ought to be in an amount sufficient to include all the costs in the action, as well prospective as those which have been already incurred. *Harvey v. Jacob*, 1 B. & A. 159; but see *Oxenden v. Cropper*, 4 Dowl. 574. In case the parties are unable to agree upon the amount, it will be ascertained by one of the masters. *French v. Maule*, 4 Man. & G. 107. The amount cannot afterwards be increased (*Foster v. Colby*, 27 L. J. Ex. 55), nor sureties afterwards added, on the ground that the previous sureties have become insolvent. *Jones v. Jacobs*, 2 Dowl. 442.

[2] As to referring equity matter to chancery officers, *see* 4 L. T. (N. S.) 416.

[3] Where notice of taxation is necessary, and none has been given, and execution issues for the amount of debt and costs, the court will not set aside the judgment or execution, but will direct a review of the taxation if any overcharge is shown. *Field v. Partridge*, 7 Ex. 689. *Taylor v. Murray*, 3 Mee. & W. 141. *Lloyd v. Kent*, 5 Dowl. 125. So where no bill of costs or copy affidavit has been given. *Wilkins v. Perkins*, 2 Mee. & W. 315. The copy affidavit of increase should show when and before whom it was sworn. *Wheldale v. Northern and Eastern Railway Co.* 13 id. 9; 2 D. & L. 276. Notice of taxation is not necessary upon a cognovit, if the costs are already fixed thereby. *Griffiths v. Liversedge*, 2 Dowl. 143.

Form of Notice of Taxation.

(Title of Court and Cause.)

Take notice, that one of the masters will tax the costs between the parties in this cause to-morrow [*or* on next] at the hour of o'clock of the noon.

P. A. &c.

Dated this day of 18

To J. M. &c.

[4] The one day's notice of taxation need not be given twenty-four hours before the appointed time; it is sufficient if delivered before seven o'clock in the evening of the previous day. *Edmunds v. Cates*, 4 Mee. & W. 66. *Perry v. Turner*, 1 Dowl. 300. *Grant v. Mackenzie*, 1 Ex. 12.

[5] Notwithstanding that one appointment only is necessary, the masters are in the habit of giving reasonable time to the parties when the circumstances warrant their so doing. Dax. Pr. 51.

Rule 61. "Notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person or by his attorney or guardian." Notice not necessary where the defendant has not appeared.[1]

(B) *Powers and Duties of Masters in Taxing Costs.*[2]

Directions to Taxing Masters, H. T. 1853, r. 1. "Between the 1st day of September and the 24th day of October in each year, one of the masters of the court of Queen's Bench, Common Pleas, or Exchequer, shall have authority to tax bills of costs, take references, and perform other necessary and immediate matters arising in, or appertaining to, any or either of the said courts, at the office of his own court; and for such purpose one of the said masters shall attend on certain days in each week as may be found necessary, and of which due notice shall be affixed in the judges' chambers, and in the respective offices of the masters of each court, and such master shall be considered as the vacation master." Taxing in vacation.

(C) *Taxation between Party and Party.*[3]

(D) „ „ *Attorney and Client.*[4]

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[1] No notice is necessary if the defendant has allowed an appearance to be entered for him by the plaintiff. *Pope v. Mann*, 2 Mee. & W. 881. *Bolton v. Manning*, 5 Dowl. 769. *Burch v. Pointer*, 3 Mee. & W. 310. The taking out and serving of a summons for time to plead after appearance entered by the plaintiff for the defendant, is not equivalent to an appearance so as to entitle the defendant to a notice of the taxation of costs. *Welch v. Vickary*, 15 id. 59.

[2] The stat. 7 Wm. 4, and 1 Vic. c. 30, s. 23, gave the masters, of all the courts, power to tax the costs arising in any of the courts indiscriminately.

[3] Between party and party there is a specific scale, whether it be the higher or lower, according to the amount for which actions are brought, which to a great nicety fixes the amount of allowance for almost every proceeding which can be contemplated at common law, and from which the masters never vary, except under special facts and circumstances, it being a general principle with them in all cases to adhere strictly to established rules, without reference to the hardship of any particular case. The costs are confined to the proceedings in the cause. Dax. Pr. 28.

This mode of taxation is pursued, notwithstanding the party's right to costs is derived from a statute which entitles him to "all such costs as have been expended," and the master will tax the costs according to the ordinary scale of allowance. *Doe v. Capps*, 5 Dowl. 634. So, where a statute directs the recovery of "full costs," the ordinary costs between party and party only are intended, no distinction being known in the law between "costs" and "full costs," and in point of practice there is no difference in the mode of taxation. *Jameson v. Trevelyan*, 10 Ex. 748. *Irwine v. Reddish*, 5 B. & A. 796. But see *Doe d. Hyde v. The Mayor of Manchester*, 12 C. B. 474.

A party not an attorney suing or defending in person, is entitled only to costs out of pocket. Dax. Pr. 31. And a married woman who pleads coverture only can have no more, because she is unable to contract with an attorney. *Findlay v. Farquharson*, 3 C. B. 347.

An attorney regularly qualified is allowed, as between party and party, to make the same charges for business done when he sues in person, as when he acts as attorney for another, with the exception of certain well-known charges for taking instructions, as he cannot instruct himself. If he employ another attorney he is entitled to no more costs than if he sues or defends in person. Dax. Pr. 31.

If the attorney of one of the parties is unqualified, so that he cannot make any claim for costs against his client, the master, on taxing the costs between party and party, will not allow to the client any costs, unless he has made advances, and then only to the extent of such advances. *Paterson v. Powell*, 2 Dowl. 738. *Humphreys v. Harvey*, id. 827.

The master, in taxing the costs between party and party, generally finds to what costs each is entitled, deducts the one set from the other, and thus ascertains and allows the balance. It is not, however, absolutely necessary that both should be taxed at the same time. In *Watson v. Boyes*, 13 Mee. & W. 635, the court held that the taxation of the costs of a party entitled to the costs of certain issues might be had, although a year had elapsed since the costs of the party entitled to the costs in the cause had been taxed and paid without any deduction.

[4] In taxing an attorney's bill, with a view to ascertain what the client ought to pay, the master allows all such disbursements, costs, and charges, which the attorney, by reason of his employment as such, has been put to and is entitled to make, disallowing prohibited, extravagant, unusual, and unreasonable items, unless the client has desired that they should be incurred, and

(E) *Taxation between Party and Party when as between Attorney and Client.*[1]

(F) „ *on the Higher or Lower Scale.*

By the Directions to the Masters of the courts of Hilary Term, 1853, r. 7, it is ordered, that "in all actions on contract other than cases wherein, by reason of the nature of the action, no writ of trial can by law be issued, where the sum recovered or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.*, without costs, the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed: Provided that, in case of trial before a judge of one of the superior courts or judge of assize, if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed on the higher scale."

Where less than 20*l.* recovered in actions of debt, the plaintiff's costs are taxed on the lower scale.[2]

Rule 8. "Where in like actions the sum indorsed on the summons shall be more than 20*l.*, but the plaintiff fails to recover more than that sum, and the judge does not certify as aforesaid, the plaintiff's costs against the defendant, whether between party and party or as between attorney and client, shall be taxed as upon a writ of trial before a judge of a court of record where attorneys are not allowed to act as advocates, as hereinafter provided for; but the defendant's costs, if any, are to be taxed upon the higher scale: Provided that in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for such trial, the judge may, if he shall think fit, direct at the time of such refusal on what scale the costs of each party shall be taxed, and in default of such direction the costs of both parties shall be taxed on the higher scale."

By rule 9 it is ordered, that "at the head of every bill of costs taken to the taxing officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of 20*l.* or not, in the following form:— 'Debt above twenty pounds;' 'Debt twenty pounds or under.'"

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has been specifically informed by the attorney that they will not be allowed on taxation as between himself and the other party in the suit. Marshall on Costs, 237. *See* vol. ii. p. 52, *et seq.*

[1] Where it is agreed between the parties ordered by the court or required by statute that the costs between party and party should be taxed as between attorney and client, a more liberal allowance is made on taxation. Although the principle of such taxation is that the party should receive all the costs for which he is liable to his attorney, and there should not be any extra costs, yet this consequence does not in every case result, for the allowance is confined to the costs in the action, and there may have been costs incurred before the commencement of the action for which the party has no indemnity; therefore, in order to include such charges, special provision must be made in the rule, order, or consent. Moreover, in cases in which the costs are taxed on this scale by consent, it may happen that in the conduct of a cause certain journeys and expenses may have been incurred unknown to the opposite party, to which, though the client may be liable, the opposite party ought not to be called upon to pay on the ground of surprise, for a consent to pay the costs to be taxed as between attorney and client is generally considered to apply only to the usual costs; and if any extraordinary costs have been incurred unknown to the party, he ought to be made acquainted therewith, otherwise he may be obliged to pay considerable expenses wholly unknown to him, and therefore never contemplated by him in the arrangement. It may also happen that the client may have a greater number of witnesses at the trial than was necessary; or he may pay them more than is authorised by the scale of allowance sanctioned by the judges; or he may choose to have a greater number of counsel, and to give them larger fees than are warranted by the circumstances of the case; or he may give special retainers to counsel. In such cases the master will not allow more than is customary for the occasion, although he may be directed to tax the costs as between attorney and client, and all such matters are considered to be within the discretion of the master. Dax. Pr. 33. See *Lipscombe v. Turner*, 4 D. & L. 125. The master will always consider what are fair and proper costs to be incurred, and will at all events limit his allowance to the same extent as between the attorney and his client. Dax. Pr. 34.

[2] If the damages in the action of debt are necessarily unliquidated, so that the plaintiff could not have tried the case before the sheriff, he will be entitled, although they do not exceed 20*l.*, to have his costs taxed on the higher scale; as, for example,

in an action to recover damages for a wrongful dismissal (*Walker v. Moss*, 7 Q. B. 189. *Jacquot v. Bourn*, 5 Mee. & W. 155; 7 Dowl. 331); or for breach of a covenant where the damages are unliquidated. *Croft v. Miller*, 6 Dowl. 73; 2 D. & L. 961.

The directions apply, with the exception in rule 8, only to cases where a writ of trial can issue; *i. e.* where the sum sought to be recovered is indorsed on the writ of summons (3 & 4 Wm. 4, c. 42, s. 17); and now, as that sum requires to be indorsed only "upon a writ served for the payment of any debt" (15 & 16 Vic. c. 76, s. 8), the lower scale of taxation applies only to those cases. *Jacquot v. Bourn*, 5 Mee. & W. 155; 7 Dowl. 331. An action of tort is expressly excluded from the directions. See *Watson v. Abbott*, 2 C. M. & R. 150; 2 Dowl. 215. *Smith v. Brown*, 2 Mee. & W. 851. The directions also apply only to the costs of a cause, and not to the costs of a reference. *Holland v. Vincent*, 9 Ex. 274. They apply as well to country causes as town causes. *Gibbs v. Whatley*, 5 Q. B. 396.

The lower scale of taxation will apply where the proceedings are stayed on payment of costs, and the debt recovered does not exceed 20*l.*, though the actions involved difficult questions (*Keppel v. Shilson*, 4 Q. B. 914. *Cook v. Hunt*, 5 Mee. & W. 161), or where the writ is indorsed for less than 20*l.* and the defendant suffers judgment by default, after resisting an application for a writ of trial. *Levy v. Magnay*, 10 Mee. & W. 664. So, where the case is referred to arbitration, and a sum less than 20*l.* awarded, the costs of the cause are taxable on the lower scale. *Wallen v. Smith*, 3 id. 138. But the costs of the reference will be taxed according to the usual allowance, as the directions do not apply to the costs of a reference, but only to the costs of a cause. *Holland v. Vincent*, 9 Ex. 274. And the same rule prevails where a cause is referred to a master of the court. *Parker v. Serle*, 6 Dowl. 334.

The costs will be taxed on the higher scale where the plaintiff claims more than 20*l.*, and the sum recovered, together with a sum paid into court, exceeds 20*l.* (*Fewster v. Boggett*, 9 Mee. & W. 20; 1 Dowl. N. S. 406. *Masters v. Tickler*, 2 Har. & W. 81); but if the plaintiff's demand exceed 20*l.*, but is reduced below that amount by a set-off or a tender before action, the costs will be taxed on the lower scale (*Savage v. Lipscombe*, 5 Dowl. 385. *Tonge v. Chadwick*, 5 E. & B. 950. *James v. Lord H. Vane*, 29 L. J. Q. B. 169. *Dixon v. Walker*, 7 Mee. & W. 214. *Contrà Cooch v. Maltby*, 23 L. J. Q. B. 305); or reduced by judge's order. 30 L. J. Ex. 110.

And where more than 20*l.* was claimed and recovered, but afterwards plaintiff gave credit for a cross demand, which brought it below that amount, the lower scale was held to apply. *Savage v. Lipscombe, supra.* Thus, in *Tonge v. Chadwick*, 5 E. & B. 950, the plaintiff in an action of contract claimed 36*l.*, the jury found the claim to the extent of 24*l.* 13*s.*; but that there was a set-off against it of 19*l.* 8*s.* 5*d.*, leaving a balance due to the plaintiff of 4*l.* 14*s.* 7*d.* The master having taxed the costs on the higher scale, the court ordered a review of the taxation. *Lord Campbell, C. J.*, said: "The question depends on the construction of the rule (Reg. Gen. H. T., 16 Vic.), which has the force of an act of parliament. I think, that on the natural grammatical construction of the words, the plaintiff has recovered in this case 4*l.* 14*s.* 7*d.* only. He proved that he had a claim to more, but the defendant proved that he had a cross claim, and the judgment is only for the balance, which is what in ordinary language is recovered. Then, is there anything in the context or subject-matter to prevent our giving their ordinary and grammatical signification to the words of the rule? On the contrary, it is perfectly just and convenient that the costs should be made to depend on the actual balance recovered."

So, where the defendant paid money into court as to part of the plaintiff's demand, under a plea of tender before action, and the plaintiff took the money out of court in satisfaction of the cause of action as to which it has been tendered, and entered a *nolle prosequi* in respect thereof, and proceeding as to the residue, he recovered 13*l.*, *Alderson, B.*, held, that the costs ought to be taxed on the lower scale. *Dixon v. Walker*, 7 Mee. & W. 214. *James v. Vane*, 29 L. J. Q. B. 169. See *Cream v. Ray*, 30 L. J. Ex. 110.

Though the directions are in terms confined to cases where the plaintiff succeeds in recovering part at least of his demand, it seems the masters have a discretion in applying a lower scale to the defendant's costs, even where the defendant succeeds in defeating the plaintiff's claim altogether (*Williamson v. Heath*, 4 Q. B. 402; 3 Gale & D. 474); though the court would not interfere if the master in such a case applied the higher scale. *Richardson v. Kensit*, 1 D. & L. 748. *Parsons v. Pitcher*, 4 Bing. N. C. 306; 6 Scott, 298.

If the master taxes the costs on the higher scale, where, in fact, he ought to have taxed them on the lower scale, the court will direct a review of the taxation. *Elleman v. Williams*, 2 D. & L. 46. See *Levy v. Magnay*, 10 Mee. & W. 664.

The judge at *nisi prius* may at any time give his certificate that the case was proper to be tried before him (*Ivey v. Young*, 5 Dowl. 450. *Broggref v. Hawke*, 3 Bing. N. C. 888; 5 Scott, 148; 6 Dowl. 67); even, it appears, after the costs have been taxed on the higher scale. *Ivey v. Young, supra.* And notwithstanding he has referred the cause to an arbitrator, to certify for what amount the verdict should be entered. *Nokes v. Fraser*, 3 Dowl. 339. But an arbitrator cannot certify without express power given him. *Wallen v. Smith*, 5 Mee. & W. 159. *Astley v. Joy*, 9 Ad. & E. 702.

On writs of inquiry before the sheriff, where less than 20*l.* damages is recovered, the costs are taxed on the same scale as on

(*a*) *Table of Costs.*[1]

writs of trial. *Hoppel v. Leigh*, 5 Dowl. 40.

Where in a cause brought in the superior courts the action has been tried by order of the court in a county court, the master may tax the costs of the trial according to the scale of allowance applicable to cases tried in the county courts. *Whittell v. Campbell*, 6 Jur. N. S. 485.

[1] The following is the general allowance of costs by the master for plaintiffs and defendants, showing also the allowance in cases under 20*l.*, as well between attorney and client as between party and party:—

	Above 20*l.*			*Under* 20*l.*		
Writs.	£	*s.*	*d.*	£	*s.*	*d.*
Summons	0	12	6	0	10	0
Concurrent summons	0	10	0	0	7	0
Renewed summons	0	10	0	0	7	6
Capias	0	12	6			
Alias	0	10	0			
Pluries	0	10	0			
Capias ad satisfaciendum	0	12	0	0	11	0
Renewed ca. sa.	0	9	6	0	8	6
Ca. sa. for the residue	0	14	0	0	13	0
Renewed	0	11	6	0	10	6
Fieri facias	0	12	0	0	11	0
Renewed	0	9	6	0	8	6
Renewed for the residue	0	14	0	0	13	0
Renewed	0	11	6	0	10	6
Fi. fa. de bonis ecclesiasticis	0	14	6			
Renewed	0	12	0			
Habere facias pos. and fi. fa. or ca. sa. for costs in one writ	0	18	0			
Habere fa. pos. alone	0	15	0			
Special indorsements on writs of summons	0	5	0			
Writ of revivor	0	12	6	0	10	0
Ejectment	0	15	0			
Of trial, exclusive of fee		—		0	8	0
Subpœna ad test.	0	7	0	0	5	0
Subpœna duces tecum	0	9	0	0	7	0
If above four folios, additional per folio	0	0	8	0	9	4
Exigi facias	1	1	0			
Capias utlagatum	1	1	0			
Elegit, Nos. 9, 10, and 11 in new rules	0	15	0			
Ditto, Nos. 12, 13, and 14	1	0	0			
Attachment	0	12	0			
Detainer	0	12	6			
Habeas corpus obtained by plaintiff, including allowance	1	0	0			
Procedendo	0	15	0			
Venditioni exponas	0	13	6			
Supersedeas, if not issued by a prisoner	0	11	0			
Copy and Service of Writs of Summons.						
Of summons, the defendant being served in London, Middlesex, or Surrey, within two miles of the place of business of the attorney, for each defendant	0	5	0	0	5	0
If beyond that distance, additional for every mile, but in cases under 20*l.* not to exceed ten miles	0	1	0	0	0	6
If the defendant should be served in any county the same allowance, but the distance to be calculated from the office of the attorney employed to effect.						
Of writ of revivor, the same as summons.						
Of writ of ejectment, the same as of writ of summons for each defendant, and in addition for every folio of copy beyond three	0	0	4			
Correspondent's charges for service of writ, including affidavit of service, and exclusive of mileage in cases in which the fixed sum for costs does not apply	0	18	0	0	12	0
The like for service of subpœnas	0	8	6	0	5	0
Extra for subpœnas duces tecum	0	2	0	0	2	0
Notice of writ for service on a foreigner out of jurisdiction	0	3	0	0	3	0
Agent's charges according to circumstances, &c.						
In cases in which the defendant shall avoid service, and an order shall be made to proceed, a sum will be allowed for attendance to serve according to circumstances of subpœna ad test.	0	5	0	0	3	0
Mileage as before	0	7	0	0	5	0

Instructions.	*Above 20l.* £ s. d.	*Under 20l.* £ s. d.
Instructions to sue or defend, for pleading special affidavits where allowed, and to counsel on special matters	0 6 8	0 3 4
To counsel in common matters	0 3 4	0 3 4
For brief	0 13 4	0 6 8
If difficult, and many witnesses and documents, discretionary.		
For every suggestion	0 6 8	0 3 4
For plea of suggestion	0 6 8	0 3 4
For issue in fact by consent	0 13 4	0 6 8
For suggestion to revive, or writ of revivor when no rule necessary	0 6 8	0 3 4
For rule for writ of revivor, when necessary	0 6 8	0 3 4
For proceedings in error	0 6 8	
To defend the executor after suggestion of death of original defendant	0 6 8	0 3 4
For agreement of damages	0 6 8	0 3 4
For grounds of error	0 6 8	
For assignment of errors after notice	0 6 8	
For confession of an action in ejectment as to the whole or in part	0 6 8	
To reduce special jury	0 13 4	
Drawing Pleadings, &c.		
Declaration, inclusive of instructions and engrossing, and of attendance to file or deliver	1 5 0	0 10 0
If above ten folios, for every folio	0 1 0	0 1 0
One or more pleas, if three folios or under, exclusive of instructions but inclusive of engrossing	0 4 0	0 3 0
If above three folios, for every folio drawing	0 1 0	0 1 0
Joinder of issue, inclusive of engrossing	0 4 0	0 3 0
Demurrer, inclusive of engrossing	0 4 0	0 3 0
Joinder in demurrer, inclusive of engrossing	0 4 0	0 3 0
Marginal statement of matter of law for argument, exclusive of copies for the judges	0 6 8	0 3 4
Replications, new assignments, grounds of error, pleas to assignment of errors, and other pleadings, the same as the foregoing charges for pleas.		
Issue or demurrer book	0 6 8	0 3 4
Record	*nil.*	*nil.*
Postea, when drawn by an attorney, including engrossing, for every folio	0 1 0	0 1 0
Judgment, whether by default or final	0 3 4	0 3 4
Authority to receive monies out of court	0 3 0	0 2 0
Suggestions, pleas to suggestions, and subsequent pleadings of three folios or under, inclusive of engrossment	0 4 0	0 3 0
If above three folios, for every folio drawing	0 1 0	0 1 0
Issue for the trial of facts by agreements, for every folio	0 1 0	0 1 0
Special case, per folio	0 1 0	0 1 0
Agreement of damages and copy, if five folios, or under	0 6 8	0 3 0
Above five folios, for every folio drawing	0 1 0	0 1 0
And copy per folio	0 0 4	0 0 4
Drawing writ of inquiry	0 3 4	*nil.*
Special particulars of demand or set-off, and copy per folio	0 0 8	0 0 4
Short ditto, and copy	0 5 0	0 2 0
Abstract of pleas when necessary and fair copy, or copy for judge	0 5 4	0 3 4
Bill of costs and copy for taxation, per folio	0 0 8	
Copy for opposite party, per folio 4*d.*, not to exceed	0 4 0	0 4 0
Drawing and engrossing common cognovit, and attendance thereon	0 13 4	0 6 8
If special and long	1 0 0	0 10 0
Replication accepting money out of court in full of demand, inclusive of instructions	0 4 0	0 3 0
Similiter or joinder of issue to obtain order to try before sheriff	—	0 3 0
Engrossing and Copying.		
Declarations, above ten folios, per folio	0 0 4	0 0 4
Other pleadings before enumerated, above three folios, per folio	0 0 4	0 0 4
Issue (pleadings), if fifteen folios or under	0 5 0	
If above fifteen folios, for every folio	0 0 4	0 0 4
Issue (pleadings), if ten folios or under	—	0 3 4
Above ten folios, per folio	—	0 0 4
Issue (pleadings), if ten folios or under	—	0 3 4
Above ten folios, per folio	—	0 0 4

	Above 20l. £	s.	d.	*Under 20l.* £	s.	d.
All proceedings on paper, per folio	0	0	4	0	0	4
The like on parchment	0	0	6	0	0	4
Judgments for non-appearance on specially indorsed writs, or writs of revivor and in ejectment, to be taken as nine folios, including the writ in actions above 20*l.*, and six folios under 20*l.*						
The allowances of 1*l.* 3*s.* 2*d.* for interlocutory judgments will be discontinued, and the drawing, entry, and other charges, will for the future be according to the future for this scale. The length of interlocutory and final judgments will be allowed as heretofore.						
Notices.						
To declare, reply, and subsequent pleadings, copy, and service	0	4	0	0	3	0
By defendant to bring issue to trial, copy and service	0	4	0	0	3	0
For special jury to opposite attorney, copy and service pursuant to section 109	0	5	3	0	3	0
The like to sheriff, pursuant to section 112	0	5	0	0	3	0
To executor or administrator of sole defendant deceased to appear to writ and suggestion	0	5	0	0	3	0
To sheriff of renewal of execution, exclusive of any payment	0	5	0	0	3	0
To plaintiff in error to assign errors	0	5	0	0	3	0
Of discontinuance of error	0	4	0	0	3	0
Of confession of error	0	4	0	0	3	0
Of plaintiff's in error intention to proceed to personal representatives of defendant deceased	0	5	0	0	3	0
Of appearance, when appearance duly entered, and notice given on the day of appearance, but not otherwise	0	4	0	0	3	0
Of appearance to writ of revivor	0	5	0	0	3	0
To plead	0	4	0	0	3	0
Of declaration, when necessary, copy and service	0	5	0	0	5	0
Of objection for misjoinder or nonjoinder of plaintiff, copy and service	0	5	0	0	4	0
To sheriff to discharge a prisoner out of custody, copy and service	0	4	0	0	3	0
Notice in ejectment to defend for part of premises and service	0	5	0			
If above three folios, for every folio additional	0	1	0			
Notice of admission of right, and denial of ouster by a joint-tenant, &c.	0	6	0			
If above three folios, for every folio	0	0	4			
Discontinuance by claimant in ejectment and service	0	5	0			
Of confession of action as to the whole or in part, and service	0	10	0			
Of trial, inquiry, demand of residence of plaintiff, of authority for issuing writ, and all other common notices	0	4	0	0	3	0
To admit or produce, if short	0	7	6	0	5	0
The like, if long	0	10	0	0	5	0
If very long and special, a larger allowance may be made in cases above 20*l.*						
Additional allowance for mileage, as upon the service of a writ.						
Copy and Service.						
Of special and common rule	0	5	0	0	4	0
Of special rule above three folios, per folio additional	0	0	4	0	0	4
Of summons or order of a judge	0	3	0	0	3	0
Of order to charge a prisoner in execution	0	5	0			
Of master's note of receipt, and of affidavits in error in fact	0	7	0			
Of master's note of receipt in error in law	0	5	0			
Mileage on services as upon a writ of summons.						
Ejectment.						
Instructions to sue and examining deeds	0	13	4			
If a question of title	1	1	0			
Attendances.						
To search for appearance to writ of summons	0	3	4			
Two searches will be allowed, if necessarily made.						
To obtain undertaking to appear	0	5	0	0	5	0
To give undertaking to appear	0	5	0	0	5	0
Deponent to be sworn (where allowed) for rules where no attendance in court, to enter exception to bail, to leave writ at sheriff's office, to obtain return to writ, to alter or amend pleadings, to file any proceeding, to obtain office copies, consent to any summons, for postea (if necessary) to set down case or demurrer, each judge with demurrer book or special case to deliver, points to each judge to ascertain if books delivered, and other like attendances	0	3	4	0	1	4

	Above 20l. £ s. d.	*Under 20l.* £ s. d.
To set down causes for trial	0 6 8	0 3 4
On each counsel with brief at trial, fee under twenty guineas, to reduce special jury summons before a judge, and to pay money into court	0 6 8	0 3 4
On counsel, with brief, fee, twenty guineas and above	0 13 4	
To receive money out of court	0 10 0	0 6 8
Counsel with brief on motion, if above one guinea fee	0 6 8	0 3 4
If one guinea only	0 3 4	0 3 4
Consultation with counsel	0 13 4	*nil.*
Conference with counsel	0 6 8	
Fee on every record writ of trial	0 6 8	0 3 4
For common jury panel	0 3 4	0 3 4
For special jury panel	0 6 8	0 3 4
To obtain names of viewers	0 6 8	0 3 4
To enter any suggestion on roll when necessary	0 3 4	0 3 4
Attending court, cause made remanets	0 13 4	0 6 8
Attending for fresh panels after remanet, as before.		
Attendance incidental to agreement of amount of damages according to the circumstances.		
Attendance in pursuance of notice to admit	0 6 8	0 3 4
For every hour beyond one	0 6 8	0 3 4
Attending making admissions, except under special circumstances	0 6 8	0 3 4
On reference to master upon common matters, such as to compute upon a bill or bond	0 6 8	0 6 8
Special matters	0 13 4	0 6 8
For every hour after the first	0 6 8	0 3 4
If counsel in attendance	0 6 8	0 3 4
Attorney attending	0 6 8	0 3 4
Above one hour	0 13 4	0 6 8
To attest confession in ejectment	0 6 8	
To file the memorandum of errors and obtain master's receipts	0 6 8	0 3 4
Assizes, each day, exclusive of expenses, but inclusive of all matters transacted except one; attendance upon each counsel with brief	2 2 0	
Expenses, exclusive of travelling, for each day	1 1 0	
Travelling expenses, the amount actually and reasonably paid, but in no cases to exceed 1s. per mile one way; if two causes in each, per day for attendance	1 11 0	
If three causes or more, each	1 1 0	
If more than one cause, expenses at 1*l.* 1s. each, day and travelling expenses to be divided equally; clerk's attendance discretionary if more than one cause, or in special cases, not exceeding per day, inclusive of expenses, except travelling	1 1 0	
In assize towns in which two lists are made, and in special jury causes, the attendance of the attorney will not be allowed from the commission day, but only from such period as his attendance became proper.		
On writ of inquiry or writ of trial at a distance, if no other business, inclusive of expenses, per day	2 2 0	1 1 0
If two cases, each	1 11 6	0 13 4
If more than two cases, each	1 1 0	0 13 4
Travelling expenses as before, and to be apportioned if more than one cause.		
In London or Middlesex, or in same town, on trial or writ of inquiry, when cause in paper and not tried, per day	0 13 4	0 6 8
On trial	1 1 0	0 13 4
Ditto, if occupied the whole day	2 2 0	
Managing clerk to conduct cause at a distance, when only one cause, per day	1 11 6	0 13 4
If more than one cause, each	1 1 0	0 10 6
Travelling and other expenses, the same as attorney		
Court on motion, rule *nisi* granted	0 6 8	0 3 4
The like on rule absolute, *nisi*	0 13 4	0 6 8
The like, previous to agreement, per day	0 6 8	0 3 4
The like in cases set down in the paper, not exceeding for a whole term	2 0 0	1 0 0
After term when sittings, not exceeding	1 0 0	0 10 0
Taxation on postea	0 13 4 to 1 0 0	0 3 4 to 0 6 8

More, according to time occupied.

	Above 20l. £ s. d.	*Under 20l.* £ s. d.
Ditto costs of cause otherwise than on postea	0 6 8 to 0 13 4	0 3 4
Ditto costs of judgment only, and ordinary interlocutory matters	0 3 4	0 3 4
Briefs.		
Minutes of evidence	—	0 13 4
Brief, and one fair copy, where cause tried before a judge of a court of record, where attorneys are not allowed to act as advocates, not exceeding	—	2 0 0
In the like case, fee to counsel and clerk	—	1 3 6
For drawing, per folio	0 1 0	
Copying	0 0 4	
Term Fees and Letters.		
Proper business	0 13 0	0 10 0
Agency	0 15 0	0 12 0
Letters when no term fee, proper business	0 3 0	0 2 0
Agency	0 5 0	0 3 0
Letters in interlocutory matters proper	0 2 0	
Agency	0 3 0	
In actions under 20*l.*, no allowance will be made for "letters" for the vacation preceding the term in which a term fee shall be allowed.		
Letters.		
Letter before action, and other letters	0 3 6	0 2 0
Circular letters after the first	0 1 6	0 1 0
Affidavits.		
Drawing special affidavits, per folio	0 1 0	0 1 0
Engrossing same, exclusive of affidavits of increase	0 0 4	*nil.*
Common affidavits of five folios, or under, including engrossing and oath	0 6 0	0 5 0
Affidavit of increase, including engrossing and oath		0 5 0
Copy for the other side		0 2 0
Searches.		
All common searches, exclusive of payment	0 3 4	0 3 4
If very long	0 13 4	0 6 8
Counsel.		
To attend reference to master, not exceeding, except an examination of witnesses	2 2 0	*nil.*
To settle special indorsement on writ	*nil.*	
Warrant of Attorney.		
Costs of signing judgment	3 10 0	
Defendants.		
Appearance	0 7 0	0 6 0
For each additional defendant, inclusive of payment	0 1 6	0 1 6
A second summons, and order for time to plead, shall be allowed in special cases above 20*l.* when necessary.		
Counsel's Clerk's Fees.		
The fees to be allowed to counsel's clerk not to exceed as under: —		
Upon a fee under five guineas	0 2 6	
Five guineas, and under ten guineas	0 5 0	
Ten, and under twenty guineas	0 10 0	
Twenty, and under thirty guineas	0 15 0	per cent.
Thirty, and under fifty guineas	1 0 0	
Fifty guineas and upwards	2 10 0	
On Consultation.		
Senior's clerk	0 7 6	
Junior's clerk	0 2 6	

(G) *Allowance on Taxation where a Statute gives Double or Treble Costs.*

5 & 6 Vic. c. 97, s. 1, enacts, "that so much of any clause, enactment, or provision in any act or acts, commonly called public, local and personal, or local or personal, or in any act or acts of a local or personal nature, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party shall or may be recovered, shall be and the same are hereby repealed: Provided always, that in lieu thereof the usual costs between party and party shall and may be recovered, and no more."

The provisions of local acts giving double costs are repealed.

Sect. 2. "That so much of any clause, enactment, or provision in any public act or acts, not local or personal, whereby it is enacted and provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: Provided always, that instead of such costs, the party or parties heretofore entitled under any such last-mentioned acts to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses, incurred in and about any action, suit, or other legal proceedings, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner, and by the same authority, as any other taxation of costs by such officer."

A reasonable indemnity is substituted for double costs given by a public act.[1]

	Above 20*l.* £ s. d.	*Under* 20*l.* £ s. d.
On general retainer	0 10 0	
On common retainer	2 2 6	
On conference	0 5 0	

Allowance to Witnesses.

For these costs, *see post*, Witness.

Miscellaneous.

Close copy of proceeding in agency cases, 4*d.* per folio, according to actual length.

In cases under 20*l.*, no allowance will be made in respect of the following matters:—

Attending deponent to be sworn to affidavit.
Advice on evidence.
Maps, plans, or models.

For maps or plans when used in case above 20*l.*, from 1*l.* 1*s.* *to* 3*l.* 3*s.*

Direct Tax, H. T. 1853. (Signed by the Judges).

[1] The following statutes are within the 5 & 6 Vic. c. 97, viz.: 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, s. 5, which give double costs to defendant who is a constable or parochial officer; 11 Geo. 2, c. 19, for securing payment of rents, which gives double costs to defendant in action for an entry, distress, or seizure; 43 Geo. 3, c. 99, s. 70, which gives defendants treble costs in actions for acts done in collecting the assessed taxes; 1 Geo. 4, c. 87, s. 6, which gives double costs in certain actions of ejectment; 6 Geo. 4, c. 50, which gives double costs to defendants in actions for acts done under the Jury Act; 7 & 8 Geo. 4, c. 29, s. 30, the Larceny and Malicious Injuries Acts, which give costs between attorney and client to defendants; 7 & 8 Geo. 4, c. 53, s. 115, which gives treble costs to defendant acting as officer of excise; 10 Geo. 4, c. 44, s. 41, and 2 & 3 Vic. c. 71, s. 53, the Metropolitan Police Acts, which give costs as between attorney and client; 5 & 6 Wm. 4, c. 50, s. 109, which give same to defendant acting under the Highway Act; 5 & 6 Wm. 4, c. 76, s. 133, which gives the same costs for acts under the Municipal Corporations Acts; 5 & 6 Wm. 4, c. 83, s. 3, which gives treble costs to patentee on a second action for infringement; 1 & 2 Vic. c. 110, s. 110, which gives treble costs to defendants acting under the Insolvent Debtors Acts.

In determining whether a statute giving double costs is local or personal, and therefore repealed, or whether it is a general act, and therefore in force, the circumstance that it is printed amongst the public or general acts is not conclusive as to its character. Indeed this distinction of statutes is of recent introduction. Regard must be had to the subject-matter of the enactment, whether it is in its nature local, or of general application throughout England. Marshall on Costs, 255. See *Richards v. Easto*, 15 Mee. & W. 244. *Colk v. Gent*, 12 id. 234. *Burnett v. Cox*, 9 Q. B. 617.

Where a statute gives double or treble damages for a cause of action, for which at

(H) *Of the Allowance for the Costs of Witnesses and of Documentary Evidence.*

(*a*) *Of the Affidavit of Increase.*[1]

(1) *What it must State.*[2]

(2) *Form of Affidavit.*[3]

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common law a party would only be entitled to single damages, double or treble costs follow such verdict, as a matter of course (*Bylotta v. Pointell*, Dyer, 15 Q. B), for the costs are, in fact, part of the damages. *Deacon v. Morris*, 2 B. & A. 393.

The above statute does not apply to those statutes which give a party a right of action to recover double or treble the amount of damages actually sustained. *Charrington v. Meatheringham*, 2 Mee. & W. 142.

Difficulty has been experienced in making the title of a party to double costs now to a full indemnity appear, especially in a case where the plaintiff has been nonsuited, or has discontinued the suit, and the matter does not appear on the record. The statute, indeed, in some instances, requires that the judge who tried the cause should certify that the case is within the act; in which event he must have the certificate of the judge. *Norman v. Danger*, 3 Y. & J. 203. *Penney v. Slade*, 7 Dowl. 441. In other cases the master may be satisfied by the admission of the parties, or he may, upon affidavit, adjudicate whether the facts bring the case within the enactment (*Forman v. Dawes*, 11 Mee. & W. 730; 1 D. & L. 299); or the judge or the court will order him to allow such full indemnity. *Maberley v. Titterton*, 7 Mee. & W. 540. But no suggestion on the record is necessary, nor will such suggestion, it has been said, be allowed (*Maberley v. Titterton, supra*); but see *Walker v. Egerton*, Comb. 322. *Cathero v. Cooper*, 2 Barn. 103.

The right of one of several defendants to these costs is not taken away, though a judge certifies under 3 & 4 Wm. 4, c. 42, s. 32, that there was reasonable cause for making him a defendant. *Humphrey v. Wodehouse*, 1 Bing. N. C. 506; 1 Scott, 395.

Statutes which have passed subsequently to 5 & 6 Vic. c. 97, have, notwithstanding its provisions, given increased costs. Thus, 8 & 9 Vic. c. 100, the Lunatics Act; 9 & 10 Vic. c. 95, s. 129, the County Courts Act; 11 & 12 Vic. c. 106, the Bankrupt Law Consolidation Act; 15 & 16 Vic. c. 44, the Passengers' Amendment Act; 15 & 16 Vic. c. 54, the County Courts Act; 15 Vic. c. 77, the London County Courts Act.

[1] The master is guided as to his taxation of the costs of the pleadings and the office fees down to trial, by the record; but as to the costs of the trial, including the evidence and the subpœnaing, and of payments of witnesses, counsel, and court fees, an affidavit of increase must be made, and ought to be sworn, and a copy thereof left with the master, as well as the opposite party, the day before the taxation; for it is not enough to deliver a copy without the jurat, and then swear the affidavit next day. *Wheldale v. Northern and Eastern Railway Co.* 13 Mee. & W. 9.

[2] The affidavit must state that the witnesses have been already paid, otherwise the costs cannot be allowed, even though the party sued as a pauper. *Freeman v. Rosher*, 6 D. & L. 517. *Cross v. Durrell*, 29 L. J. Ex. 111.

An attorney who, in his affidavit of increase, represents that he has paid money to witnesses, where he has not done so, though he has taken steps to do it, or who makes statements tending to heighten witnesses' costs, and oppress the opposite party, commits an offence, for which, on timely application, he may be punished by the court (*Doe d. Meux v. Hadley*, 17 Q. B. 571); and the court may even order the party to refund such monies. *Trent v. Harrison*, 2 D. & L. 941. See *Mant, In re*, 10 W. R. 13; 5 L. T. (N. S.) 254.

On the defendant's taxation of costs of issues on which he has succeeded, an affidavit that the witnesses, whose expenses he claims, were called exclusively to support those issues is not indispensable, provided the master is satisfied of the facts by other means. *Pilgrim v. Southampton, &c. Railway Co.* 8 C. B. 25. Notwithstanding the affidavit, if there be any doubt upon the point of materiality, the master will, if required, read the brief and judge for himself whether the witnesses are material or not, and allow or refuse their expenses accordingly (Dax. Pr. 253), and sometimes apply to the counsel in the cause for information.

[3] *Form of Affidavit of Increase.*

In the Q. B. [*or* C. P., *or* Ex. of Pleas].
Between A. B. plaintiff,
and
C. D. defendant.

I, P. A., of gentleman, attorney for the above-named plaintiff [*or*, and I, P. A. A., of agent in this cause for the above-named plaintiff severally], make oath and say:

(1.) That the cause was tried [*by a special jury*] at the last assizes held at Stafford, in and for the county of Stafford; that I caused two *subpœnas ad testificandum*, and one *subpœna duces tecum*, to be issued on behalf of the said plaintiff, and copies thereof to be served on W. P. of Derby, grocer; T. R. of York, journeyman tailor; S. T. of Birmingham, innkeeper; V. W. of London, surveyor [*set out the names of all the witnesses*]; that Derby is distant from my place of abode miles, and from Stafford miles; that York is distant from my place of abode miles, and from Stafford miles, &c.

That all the said witnesses were ma-

(*b*) *Of the Allowance of the Costs of Witnesses.*[1]

terial and necessary for the plaintiff in this cause, and all attended the trial thereof, and were attending the trial as witnesses in no other cause, as I verily believe, with the exception of the said W. P., who was attending as a witness in another cause which was tried the day previous to that on which this cause was tried.

(3.) And I further say, that the commission-day for the said Stafford assizes was the 4th day of March last, and this cause was tried on the 8th day of the same month; that the said W. P. and S. T. were each of them necessarily absent from their said places of abode in going to, staying at, and returning from, the said assizes, on occasion of the trial of the said cause, five days; that the said T. R. and V. W. were necessarily absent six days.

(4.) And I further say, that I attended at the said assizes on the trial of this cause as attorney for the plaintiff therein, and was necessarily absent from my place of abode on that occasion five days, and was attending there as attorney or witness in no other cause, and that I paid for conveying myself to and from Stafford, and for my expenses on the road, the sum of £ ; that the brief for the plaintiff consisted of folios, and that I paid Mr. with his brief, and his clerk, the sum of £ ; and to Mr. with his brief, and his clerk, the sum of £ ; that I also paid the following court fees [*here set them out*]; that I paid to the said witnesses for their attendance and travelling expenses the several sums of money following: that is to say, to the said T. R. £ , &c. &c.; and I also paid tavern bills for the first-mentioned two witnesses, amounting to £

Sworn, &c. P. A.

[1] The general rule is, that each party is entitled to the costs of witnesses whose evidence was exclusively applicable to the issues upon which he succeeded. *Nicholson v. Dyson*, 11 Mee. & W. 548. And the number to be allowed is in the discretion of the master. *Pilgrim v. the Southampton &c. Railway Co.* 8 C. B. 43. *Skelton v. Seward*, 1 Dowl. 411. But the party entitled to the general costs of the cause is entitled to the expense of the attendance of all the necessary witnesses whose evidence applied materially to any issue upon which he succeeded, although it was likewise applicable to issues upon which he failed. *Richards v. Cohen*, 1 Dowl. 533. *Eades v. Everatt*, 3 id. 687. While the party who has succeeded upon particular issues, but is not entitled to the costs of the cause (having failed in the suit), is allowed only the costs of such of his witnesses as gave evidence exclusively applicable to some issue on which he succeeded; for if the witness gave evidence substantially applicable to an issue upon which such party failed, as well as to an issue upon which he was successful, the costs of such witness cannot be allowed. *Lardner v. Dick*, 2 C. & M. 389. *Crowther v. Elwell*, 4 Mee. & W. 71. *Clothier v. Gann*, 22 L. J. C. P. 98.

The master exercises a large discretion in taxing the costs of evidence and witnesses, according to the importance of the inquiry. In general he allows costs of that evidence only which bears on the matter at issue between the parties, and was material. Where the party, therefore, brings witnesses to prove what was unnecessary, he will not be allowed their costs, unless he can satisfy the master that, as a measure of precaution, there was reasonable ground for being prepared with such evidence. *Hardy v. Tingey*, 19 L. J. Ex. 233; 5 Ex. 294. But where the witness is material, his expenses will be allowed, though he was subpœnaed and paid by the other party (*Benson v. Schneider*, 7 Taunt. 337; 1 Moore, 21, 76), or not called at the trial, if there was a reasonable necessity for his attendance to repel a case which might be set up by the other side. *Miller v. Thompson*, 4 Man. & G. 260. *Morison v. Harmer*, 5 Scott, 410. *Bagnall v. Underwood*, 11 Price, 510. *Adamson v. Noel*, 2 Chit. 200.

If the witness is inadmissible or rejected by the judge, the expenses are not allowed. *Galloway v. Keyworth*, 13 C. B. 228; but see *contra*, *Rushworth v. Wilson*, 1 B. & C. 267.

But if a witness subpœnaed does not attend at the trial, nothing will be allowed for him, although money may have been paid with the subpœna, and he may have been a necessary witness. Dax. Pr. 236. And if after a cause is called on at *nisi prius* it is referred to arbitration, the party entitled to the costs of the cause ought not to be allowed the expense of witnesses who did not arrive at the assize-town until after the cause was referred — the rule being not to allow the expense of witnesses who were not present before the cause was called on. *Fryer v. Sturt*, 24 L. J. C. P. 154.

Where a defendant having obtained a rule to change the venue, the plaintiff withdrew the record, and on defendant abandoning the rule the cause was tried, and the plaintiff succeeded, he was held not entitled to the costs of witnesses on their way to London at the time the rule to change the venue was obtained, for he need not have withdrawn the record, but might have proceeded to trial, unless the costs of the rule were paid. *Pugh v. Kerr*, 6 Mee. & W. 17.

Since parties may now be witnesses in their own cause, the reasonable expenses to which a plaintiff is put by being obliged to attend and be examined as a witness, to enforce payment of a just demand, or to seek redress for an injury, should be thrown on the wrongdoer. *Howes v. Barber*, 21 L. J. Q. B. 254. *Per Lord Campbell, C. J.: Barker v. Clough*, 7 Jur. (N. S.), 545; 18 Q. B. 588. And it is for the master to use vigilance in detecting any abuse of this rule. *Clothier v. Gann*, 13 C. B. 220. So, where the plaintiff, a seafaring man, was a material

witness at the trial, and after he obtained a verdict a rule *nisi* for a new trial was granted, which was afterwards discharged, the court held the master rightly made the plaintiff an allowance for subsistence from the time the rule was granted till it was discharged, on the ground that he was a necessary witness, and must remain in the country to give evidence on the second trial. *Dowdell v. Australian Royal Mail Co.* 3 E. & B. 902. But the court refused to lay down any general rule that parties, if witnesses, are to have an allowance for their attendance. (Id.) If, however, the attendance of the party as a witness was unnecessary, and his real object in attending was merely to superintend the conduct of the cause, his costs would not be allowed. The allowances to witnesses are regulated by the directions of the court, and are stated *ante*, p. 321.

Scale of Allowances.—Common witnesses, such as labourers, journeymen, &c., resident in same town, 5*s.*; otherwise, 5*s.* to 7*s.* 6*d.* per diem; master-tradesmen, yeomen, &c., 7*s.* 6*d.* to 10*s.*; auctioneers and accountants, 10*s.* 6*d.* to 1*l.* 1*s.*; professional men, 1*l.* 1*s.*; attorney's or other clerks, 10*s.* 6*d.*; gentlemen, bankers, merchants, 1*l.* 1*s.*; females, according to station in life, from 5*s.* to 10*s.*; police inspectors, 5*s.*; constables, 3*s.*

Travelling Expenses.— A reasonable sum is allowed for the expense of the witnesses journeying to and from the place of trial. By the Directions of the Masters of H. T. 1853, it is ordered, that "the travelling expenses to witnesses shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way." The one shilling per mile is a maximum, not a rule. *Hunter v. Liddell*, 16 Q.B.402. *Radcliffe v. Hall*, 3 Dowl. 802. The master allows the expense of that mode of travelling which is suitable to the position in life and the state of health of the witness (*Dixon v. Lee*, 1 C. M. & R. 645); and although he cannot allow more than one shilling per mile, he will not allow so much if less has been expended, but only what has actually been paid to the witness in respect of travelling expenses.

Subsistence-Money.— The witness is also entitled to be reimbursed the reasonable expense of his maintenance during his attendance at the trial, having reference to his condition in life; and the master, in taxing the costs between party and party, allows to the successful party such expenses for the subsistence of witnesses brought from their homes, during the time it was reasonable they should have been kept in the assize-town for the purposes of the trial. *Thomas v. Saunders*, 3 Nev. & M. 572. The question of what is a reasonable time is one for the discretion of the master. *Platt v. Greene*, 2 Dowl. 216. There is, however, a general rule, that the expense of keeping the witnesses from the commencement of the assizes is allowed; but not the expense of their subsistence at the assize-town before the commission-day. But there may be cases in which it may be proper to make the allowance. *Harvey v. Divers*, 16 C. B. 497. In *Cosgrave v. Evans*, 2 Dowl. 443, the master allowed the costs of the attendance of witnesses from the commencement of the assizes, in a special jury case, although the practice, as sworn by an old practitioner, had been not to take the special jury causes until the third or fourth day of the assizes. And it was held that he had done right, for the judge might, in the exercise of his discretion, think fit to take the special jury causes first. But if a day for the trial is specially appointed before the witnesses arrive, the master will not allow for the attendance of the witnesses before the time necessary for the trial, the fixing of the day of trial being usually for the purpose of saving expense, and particularly the expense of the attendance of witnesses. And where there are cause lists for different divisions of a county, and the cause is in the second list, the allowance for witnesses will be granted from the day fixed for the commencement of such list, but not for a previous attendance, the division of the list being made for the express purpose of saving the expense of their previous attendance; and notice is usually given in such cases, that the parties need not be in attendance with their witnesses. Dax. Pr. 246.

If a witness residing abroad, or whose avocations call him abroad, is brought to this country, or, if in this country, is detained for the purpose of giving evidence at the trial, and it is necessary that he should be examined *vivâ voce*, and not by interrogatories, the costs of his journey both ways, and of his detention, may in such case be allowed by the master. *Tremain v. Barrett*, 6 Taunt. 88. *Vice v. Lady Anson*, M. & M. 96. *Sovergan v. the Royal Exchange Assurance Co.* 7 Bing. 725. *Mount v. Larkins*, 8 id. 195. *Temperley v. Scott*, 8 id. 392. *M'Alpine v. Coles*, 2 Dowl. 299. Such costs are costs of the trial. *Stewart v. Steele*, 4 Man. & G. 669. Thus, where sea captains or sailors are detained from going on a foreign voyage, subsistence-money, during the time they were detained, may be allowed, for otherwise they would have gone to sea, and a greater expense, by the postponement of the trial, would have been occasioned to the parties. *Berry v. Pratt*, 1 B. & C. 276. *Dowdell v. Australian Royal Mail Co.* 3 E. & B. 902. *Stewart v. Steele*, 4 Man. & G. 669. *Sturdy v. Andrews*, 4 Taunt. 698. So, under particular circumstances, the expense of bringing over from a foreign port, detaining here, and sending home a witness, may be allowed, though the cause did not proceed to trial, owing to the defendant paying the plaintiff his demand. But where a party brings over a foreign witness in order to judge if, from his testimony, there is ground to bring an action, and such is brought, and the witness attends at the trial, though such party may be allowed the costs of detaining the witness from the time of the writ sued out until the trial, and a reasonable sum for subsistence during that time, yet he can-

(c) *Of the Allowance of the Costs of Documentary Evidence.*

(1) *It is necessary that Notice to Admit should have been given.*

Reg. Gen. (Pr.), H. T. 1853, r. 30. "In all cases of trials, writs of inquiry, or inquisitions of any kind, either party may call upon the other party, by notice, to admit documents in the manner provided by, and subject to, the provisions of the Common Law Procedure Act, 1852; and in case of the refusal or neglect to admit, after such notice given, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the

The costs of proving documents are not allowed, unless notice to admit has been duly given.[1]

not be allowed the costs of his passage hither, or of his return. *Schimmel v. Lousada*, 4 Taunt. 695. But the mere fact that the witness was brought before the action commenced is not a ground for disallowing his travelling expenses. *Tremain v. Faith*, 1 Marsh. 563. Where the witness might have been examined on interrogatories by a commission under 1 Wm. 4, c. 22, but was detained in this country under the advice of counsel, the character of the witness being likely to be attacked, the costs of detaining him were allowed, it being, in such a case, an exercise of sound discretion. *Evans v. Watson*, 3 C. B. 327. It is for the master's discretion to consider during what time subsistence-money should be allowed to such a witness. Where the trial was postponed from the summer to the spring assizes, subsistence-money has been allowed for three hundred days. *Schimmel v. Lousada, supra.* But where a rule for a new trial was granted on a point as to which the evidence of the witness was inapplicable, subsistence-money from the first trial till the disposal of the rule was refused. *Mount v. Larkins*, 8 Bing. 195; 1 M. & Scott, 357; 1 Dowl. 262. In cases of detaining seafaring witnesses, though the expenses of living and travelling expenses may be allowed, yet the amount which the witness might have earned as wages, if he had sailed, is not allowed. *White v. Brazier*, 3 Dowl. 499.

If a witness attend in more causes than one, a proportionate part only of his expenses will be allowed to the successful party in one of such causes. The rule is, if the witnesses attend in one cause only, they will be entitled to the full allowance; if they attend in more than one, they will be entitled to a proportionate part in each cause only. *See* Table of Allowances, *ante*, p. 314. In *Griffin v. Hoskins*, 1 H. & N. 95, the plaintiff had been brought up under a writ of *habeas corpus ad testificandum* to the assizes, to be a witness on his own behalf in two causes against the same defendants, in one of which he succeeded, and in the other he failed. The master allowed the plaintiff, on taxation in the action upon which he succeeded, all the costs of the writ of *habeas corpus*. The court held that he ought to apportion the costs, and allow one-half only of the expense.

Experiments.—The costs of qualifying witnesses to give evidence, or of informing their minds for that purpose, are never allowed in taxation between party and party. The rule is, that the costs of all evidence which naturally exists as to any issue will be allowed, but the expenses of artificial discovery by experiments, resorted to from the anxiety of the parties to throw extra light upon it, will not. *Per Pollock, C.B.: Omerod v. Thompson*, 4 Ex. 85. On this ground the costs of experiments made by scientific men (*Severn v. Olive*, 2 B. & B. 72; 6 Moore, 235); of surveying and taking levels as to a wrongful act done (*Omerod v. Thompson*, 16 Mee. & W. 860. *May v. Selby*, 4 Man. & G. 142; 4 Scott, N. R. 727); or of journeys and inquiries to prove that the plans and surveys for which the surveyor sued were badly made (*Gravatt v. Attwood*, 21 L. J. Q. B. 215; 1 Bail. C. C. 27); or of obtaining and analysing specimens of earths to meet an action in the case for injuring a watercourse by depositing noxious materials (*Lamb v. Simpson*, 4 Ex. 85); or of taking the witness to see a defendant, with a view to identify the latter as the trespasser (*Small v. Batho*, 21 L. J. Q. B. 254; 1 Bail. C. C. 43), are not allowed. But an allowance for the expenses of plans, maps, or models of the land, or matter in dispute, may be made in cases above 20*l.* Direct Tax, H. T. 1853.

[1] See the same provision in the 15 & 16 Vic. c. 76, s. 17; and by the 118th sect. of the same act "an affidavit of the attorney in the cause, or of his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions. *See post*, Evidence.

The costs incurred by a party, by neglecting or refusing to admit documents, as to which notice to admit has been served, cannot be taxed before the general taxation of the costs of the cause. *Lewis v. Howell*, 6 Ad. & E. 769. And where the notice to admit was so voluminous as to increase instead of diminishing the costs, the court refused to allow the costs altogether, as a fraud on the rule of court. *Edwards v. Great Western Railway Co.* 12 C. B. 419. Where a defendant, after serving notice to admit, duly proved the document, and was entitled to the costs thereof, and the plaintiff was nonsuited, but obtained a rule to set the nonsuit aside, the court refused to allow the defendant's costs of proof to be taxed pending the rule, as they ought to be set off against the plaintiff's costs, in case of his ultimately succeeding. *Doe d. Davies v. Davies*, 12 Ad. & E. 21.

cause may be, unless at the trial or inquisition the judge or presiding officer shall certify[1] that the refusal to admit was reasonable; and no costs of proving any document shall be allowed, unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the master, a saving of expense."

(2) *Maps, Plans, and Models.*

An allowance not exceeding three guineas may be made in cases above 20*l.*[2]

H. T. 1853. *Directions to Masters:* "It is ordered, that in cases under 20*l.* no allowance shall be made for maps, plans, or models; and an allowance is directed for maps or plans, when used in cases above 20*l.*, from 1*l.* 1*s.* to 3*l.* 3*s.*"

(3) *Searches for Pedigrees, &c., and Translations of Documents.*[3]

(I) *Of the Allowance for Briefs and the Fees of Counsel.*

(*a*) *Fees to Counsel.*[4]

The notice is required in all cases where documents are intended to be given in evidence, whether they are put in issue on the record or not. *Spencer v. Barough*, 9 Mee. & W. 425. It is no excuse for not giving the notice that the attorney of the party having been applied to to admit the document refused to do so. (Id.)

Where the attorney's clerk negligently lost the bill of exchange on which the action was brought, and plaintiff was obliged to call witnesses to give secondary evidence, the court was equally divided as to whether the master properly allowed the plaintiff, who obtained the verdict, the costs of these witnesses. *Matthews v. Livesly*, 11 Ex. 221; 24 L. J. Ex. 252.

[1] See *Freeman v. Rosher*, 6 D. & L. 817.

[2] No more than the maximum sum mentioned can be allowed by the master, however expensive the plans used may have been. *Sherwood v. Frend*, 1 W. J. R. 186. If plans are applicable as well to issues upon which the party producing them has failed, as to those upon which he has succeeded, the expense of them will not be allowed, unless he is entitled to the general costs of the cause. *Pilgrim v. Southampton &c. Railway Co.* 8 C. B. 25.

[3] Searches for pedigrees and for ancient records, charters, or other documents, may, if successful, be allowed between party and party. In *Johnson v. Lawson*, 2 Bing. 341, the master allowed the expense of searches for pedigrees in various public offices, parish churches, &c. It was objected that they were in the same situation as instructions to a witness, and ought not to have been allowed. But the taxing officer having reported that it was always the practice to allow for successful searches in registers to establish pedigrees, and having referred to a manuscript case, in which such expenses had been allowed, the court confirmed the taxation. So it was recently held that the expense of the successful search for documents material to the trial, and translating them into English, may be allowed. *Daniel v. Wilkin*, 8 Ex. 156. See *Whitehouse v. Penn*, 9 Moore, 644, n. b. *Bastard v. Smith*, 10 Ad. & E. 213.

[4] It has been the practice from the earliest times to allow a successful party the fees paid to his counsel as against the unsuccessful party. *Morris v. Hunt*, 1 Chit. 544.

The number of counsel to be allowed is a matter within the discretion of the taxing master, and the exercise of it should be regulated to a certain degree by the nature and magnitude of the cause, and the number of witnesses. *Morris v. Hunt, supra. Hawkins v. Rigby*, 8 C. B. (N. S.) 271; 6 Jur. N. S. 208. *Grindall v. Godman*, 5 Dowl. 378. The costs of a second counsel may be allowed for, even in a case in which he could not be heard, if it were proper that he should be employed for the purpose of taking notes. *Stewart v. Steele*, 4 Man. & G. 669. There is no rule to the effect that the expense of a third counsel will not be allowed unless the number of witnesses exceed ten; and where it does not, the difficulty and importance of the case might justify the allowance of three counsel. *Sharp v. Ashby*, 12 Mee. & W. 732.

Where notice is given by the plaintiff of bringing on the cause as undefended, and the defendant does not appear at the trial, or if the facts are all admitted and the plaintiff has only to appear in court to take a verdict, only one brief to counsel for the plaintiff will be allowed. When no such notice is given, and there is reasonable ground to expect that the defendant will appear and defend the cause, two briefs to counsel are usually allowed. Dax. Pr. 297.

In considering what fees should be given to counsel, the attorney must use a fair discretion, no scale of allowance being laid down. If there appears to the master to be nothing unreasonable in the amount given, he will allow the same. The master is at liberty to allow a retainer fee to one counsel in the cause. No refresher fee to counsel is allowed, unless the cause goes over to another term; nor is any fee allowed on attendance to hear judgment after argument. The payment of fees to counsel must

Reg. Gen. H. T. 1853, *Directions to the Masters*, orders: "No fees to counsel to be allowed on writs of trial, except on trials before the judge of the sheriff's court of London, or of other courts of record where attornies are not allowed to practise, and then 1*l.* 1*s.* only." On writs of trial.[1]

Reg. Gen. H. T. 1853, r. 4. "The masters shall have discretion in all cases to allow, as between party and party, the fees of counsel or special pleader for drawing pleadings or other proceedings, whether special or otherwise, and advising." Costs of drawing pleadings and advising.[2]

Reg. Gen. H. T. 1853, r. 6. "The costs of attendance by counsel or special pleader before a judge at chambers shall in no case be allowed as between party and party, unless the judge shall certify for such allowance." Attendance at judge's chambers not allowed, unless judge certify.

(*b*) *Briefs.*[3]

Reg. Gen. H. T. 1853. *Directions to Masters:* It is ordered, that "in order to diminish as much as possible the costs arising from the copying of documents to accompany the briefs of counsel, the masters are to allow only the copying of such documents, or parts of documents, as they may consider necessary for the instruction of counsel, or for use at the trial." The costs of copying such documents to accompany briefs only as were necessary will be allowed.

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either be vouched by affidavit, or by the production of the briefs, with counsel's signature thereto. Dax. Pr. 305.

Although issues have been found against the party entitled to the costs in the cause, he is in general entitled to be allowed the whole of the fees paid to counsel, since such costs being in respect of issues found in his favour, their application to issues found against him as well cannot affect his title. *Fazakerley v. Rogerson*, 1 L. M. & P. 747.

A scale of allowance of counsel's clerk's fees, varying from 2*s.* 6*d.* to 2*l.* 10*s.* per cent, is prescribed by the rules of court. *See post*, p. 384.

[1] Even as between attorney and client the costs of employing counsel on a writ of trial, in a case where they cannot be allowed as between party and party, will be disallowed to the attorney, unless the client requested that counsel should be retained, knowing that the expense would not be allowed in any event, or acquiesced in the employment after having this fact explained to him. *Foy v. Cooper*, 2 Q. B. 937. *In re Smith*, 13 Mee. & W. 477.

[2] The master, in the exercise of his discretion, allows the fees of counsel for the drawing of pleadings, where the specialty or difficulty of the case rendered it prudent to resort to counsel for this purpose. The master is also at liberty to use his discretion in allowing a case for the opinion of counsel on the evidence (*Cheshire v. Mumford*, 2 C. L. R. 746), and also for a consultation of counsel on the delivery of the briefs. But neither the opinion on evidence nor expenses of consultation can be allowed until the cause is at issue. Dax. Pr. 304. See *Knight v. Gravesend Railway Co.* 2 H. & N. 3; 27 L. J. Ex. 8.

[3] The master allowed to the successful party for all matter which it was proper to state in the briefs, and for the copying of all necessary documents; but if the briefs should contain impertinent matter, or documents which need not have been set forth therein, such superfluous parts of the briefs will be disallowed on taxation. The allowance for drawing is after the rate of 1*s.* per folio (not to exceed 2*l.* in cases under 20*l.*). Where letters, agreements, or other documents, are set forth in the brief, the master allows only for copying at 4*d.* per folio. How many counsel soever be employed, there can of course be one charge only for drawing. Marshall on Costs, 293. An attorney employed by two plaintiffs, in separate actions against the same defendant, suing for injuries arising out of the same matter, and in which the briefs are consequently nearly alike, is, nevertheless, entitled in each action to be allowed full costs of drawing the briefs in each. *Oppenshaw v. Whitehead*, 9 Ex. 389. If, however, the attorney makes out one full brief only, and merely a short statement in the other actions, the master will allow for such short statements only in these actions, and not an allowance as if they were full briefs. *Martineau v. Barnes*, 1 Tidd. 666. It is to be observed, that in *Oppenshaw v. Whitehead* the attorney was employed by different plaintiffs; but if one attorney be employed by the same plaintiff, in several actions brought by the same instrument against several defendants, he will not be entitled to the full charge for drawing the briefs in each cause, if it appears that the statement of the case was nearly the same in all; but the master will peruse the briefs, and apportion the costs of drawing the same to the several actions, allowing, however, for copies of the whole in each action. Dax. Pr. 298.

The allowance for the length of briefs, and for the copying of letters and documents set out in or accompanying the briefs, is a matter peculiarly within the discretion of the taxing masters. *Pilgrim v. Southampton &c. Railway Co.* 8 C. B. 335. Where a title is in question, the attorney will be allowed the charge for abstracting the title, if necessary, and for making copies of

(J) *Of the Allowance of certain Miscellaneous Costs.*

(*a*) *Letters before Action.*[1]

(*b*) *Term Fees.*[2]

(*c*) *Court Fees.*[3]

(*d*) *Attendance of Attorney at Trial.*[4]

(*e*) „ *of Interpreter.*[5]

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the abstracts, at least so far as is necessary for the conduct of the cause; but if the party have already an abstract of the title in his possession or power, he will not be allowed for a fresh draft, the same being unnecessary: he will only be entitled for the necessary copies for counsel, and he is entitled to a copy for each counsel. If the necessity of drawing the abstract be doubted or objected to, the necessity must be vouched by affidavit. Where it is necessary to give copies of proceedings in Chancery in evidence, or where the same are expected to be produced on the other side, the expense of such copies will be allowed. Dax. Pr. 296.

The general rule in taxing the costs between party and party is, not to allow the costs of short-hand writer's notes of the evidence, subject, however, to the discretion of the taxing officers to allow them in particular cases, and as to particular portions of the evidence. The counsel moving for a new trial, or who show cause against the rule, are generally the counsel who were present at the trial, and it is their duty to take such notes of the evidence as will serve them for the purpose of the motion. *Malins v. Price*, 1 Phil. 590. Neither will the charge of a short-hand writer, employed in substitution of a second counsel, be allowed. *Croames v. Gore*, 1 H. & N. 14. Where the short-hand writer's notes are allowed for, the costs of employing the short-hand writer are not allowed, but only the same charge for copying his notes as would be charged for copying the notes of counsel or any other document. *Malins v. Price*, *supra*.

[1] As a general rule, the costs of letters which passed between the attornies of the litigants before the commencement of the action, cannot be allowed on the taxation of the costs as between party and party. Thus, although it is frequently expedient before suing for the recovery of a chattel, or damages for its conversion in a case where the original possession of the defendant was lawful, to make a demand of it in writing, yet the expense of that demand is never allowed to the plaintiff as between party and party. Dax. Pr. 142. There is, however, an important exception to this rule, for in all actions for the recovery of a debt or sum certain, a sum of 3*s.* 6*d.* for a letter of demand previous to suing out the writ is allowed to the plaintiff on taxation between party and party, and may be claimed by the attorney, even although no writ is ever issued. *Morrison v. Summers*, 1 B. & Adol. 559; 1 Dowl. 325. *Capel v. Staines*, 2 Mee. & W. 850; 5 Dowl. 770. Further, where, before suing a constable or officer of the Court of Bankruptcy, &c. it is necessary to demand a perusal and copy of the warrant under which he professed to act, the expense of such demand will be allowed to the plaintiff on taxation. Dax. Pr. 141.

[2] Term fees are allowed where there are any proceedings in the cause upon and after declaration and before final judgment, but after final judgment they are not allowed. The term fee is allowed whether any proceeding be taken within the term or in the vacation; but only one term fee can be allowed for the term and vacation following the term. Where a party having the right by his own laches omits to sign final judgment when he is entitled to it, but delays doing so until a subsequent term, he is not entitled to a term fee as of the term when final judgment is actually signed, if a term fee has been already allowed in respect of the term in which he might have signed final judgment.

[3] The fees to be taken by the officers of the courts are regulated by a table prepared pursuant to the stat. 15 & 16 Vic. c. 73, and published the 24th November, 1852. *See* Table of Associates' Fees, *ante*, vol. i. p. 574. For table of fees in masters' offices and of judges' clerks, *see* these titles respectively. No fee can be taken not comprised in the table. In considering payments made during the progress of a cause, with respect to official fees, the masters will generally allow such fees as are charged by the different officers of the several courts. In case of overcharge, the proper course for relief is by application to the court. Dax. Pr. 149.

[4] Where the London agent attends the trial, it rarely happens that the attendance of the country attorney is necessary; but cases occasionally arise in which his attendance is required, and in which allowance for it may accordingly be made; but, before making such allowance, the master will require an affidavit, showing the necessity of such attendance, and a positive statement that the cause could not, under the peculiar circumstances, be entrusted to the agent. *Madison v. Bacon*, 5 Bing. N. S. 246. *Parsloe v. Foy*, 2 Dowl. 181. *Archer v. Marsh*, 7 id. 541.

Where the attorney attending at the trial to conduct the cause is examined as a witness, he is not entitled to any additional allowance on that ground. See *Jervis v. Dewes*, 4 Dowl. 764.

[5] The expense of an interpreter is allowed

(K) *Of the Set-off of Costs upon Taxation.*

Reg. Gen. (Pr.) H. T. 1853, r. 63. "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought: Provided nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted."

Interlocutory costs may be deducted, without regard to the attorney's lien.[1]

(L) *Costs of Taxation.*[2]

As to the costs of taxation of bills taxed between attorney and client, *see* vol. ii. p. 53.

(M) *Of the Review of Taxation.*

SHARP v. ASHBY, 12 Mee. & W. 732.

The master, on taxation, allowed to the plaintiff the costs of two briefs only, in a case where three counsel were retained, considering himself bound by a supposed general rule not to allow costs for more than two counsel, except in cases where ten witnesses at least were examined on the trial.

The court held that there was no such rule, and ordered a review of the taxation, in order that the master might exercise his discretion as to these costs.

If the master has acted on an erroneous principle the court will order a review of taxation.[3]

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when necessary; and the expense of the attendance of a person versed in ancient records, to translate and explain documents of that character given in evidence, may also be allowed. *Bastard v. Smith*, 10 Ad. & E. 213.

[1] The above rule applies to allow the set-off of interlocutory costs (*Melville v. Leesom*, E. B. & E. 324) against final, without consideration of the attorney's lien. See *Paxton v. Wyllie*, 10 L. J. C. P. 292. Costs of issues of fact found for the plaintiff, and of issues of law in the same suit found for the defendant, may be set off against each other, without regard to the attorney's lien. *Scott v. De Richebourg*, 11 C. B. 447. So, if the plaintiff discontinues after he has obtained judgment on demurrer, the costs of the demurrer may be set off against the costs of the discontinuance. *Mayor of Macclesfield v. Gee*, 13 Mee. & W. 470. By the 15 & 16 Vic. c. 76, s. 145, it is enacted, that "upon an arrest of judgment, or judgment *non obstante veredicto*, the court shall adjudge to the party against whom such judgment is given the costs arising out of the trial of any issues of fact arising out of the pleadings, for defect of which such judgment is given, upon which such party shall have succeeded, and such costs shall be set off against any money or costs adjudged to the opposite party, and execution may issue for the balance, if any."

In setting off interlocutory costs, the master acts without any order of the court or a judge. *Levy v. Drew*, 2 C. B. 142; 5 D. & L. 307.

Interlocutory costs in the same suit are set off against each other, notwithstanding there may be several defendants, and although the verdict may have passed in favour of some and against others (*George v. Elston*, 1 Bing. N. C. 513. *Lees v. Reffit*, 3 Ad. & E. 707. *Starling v. Cozens*, 3 Dowl. 782), or some suffer judgment by default, and others go to trial and succeed. *Schoole v. Noble*, 1 H. Black. 23.

There can, however, be no set-off of costs against a plaintiff suing *in formâ pauperis*; for as the defendant cannot have such costs, they cannot be set off. *Foss v. Racine*, 4 Mee. & W. 610. *Goughenheim v. Lane*, 1 id. 136.

The rule allowing interlocutory costs to be set off applies to the costs of the cause where a cause is referred to arbitration. *Cowell v. Betteley*, 10 Bing. 432. But where matters in difference are also awarded upon, the costs cannot be set off against a sum awarded in respect of them to the prejudice of the attorney's lien. *Doe d. Swinton v. Sinclair*, 5 Dowl. 26. *Dunn v. West*, 10 C. B. 240.

[2] On taxing the costs between party and party a reasonable sum is allowed for the bill of costs, the affidavit of increase (if any), and the attendance on taxation, as well as for the fees actually paid on taxation. Dax. Pr. 31.

[3] The court having confided a discretion in the taxing officers in the allowance of costs, are not in the habit of interfering with their taxation so long as they exercise the discretion with which they are invested. But if, first, the master refuses to exercise his discretion, as, upon an erroneous impression that he is fettered by a supposed rule, and on that ground abstains from exercising his judgment upon the propriety and reasonableness of the charges (*May v. Turn*, 12 Mee. & W. 730. *Stewart v. Steele*, 4 C. B. 460); or, secondly, where he proceeds upon an erroneous principle, or misapplies an understood rule (*Ward v. Bell*, 2 Dowl. 76. *Vere v. Moore*, 5 id. 367); or, thirdly, makes an allowance on a false or defective affidavit (*Barnes v. Attwood*, 5 C. B. 164. *Trent v. Harrison*, 2 D. & L. 941. *Pomfrey*

XVII. Remedies for Costs.

(A) *Action on Bill of Costs.* *See* vol. ii. p. 55.

(B) *Remedy by Attachment or Entering up of Judgment for Amount of* Allocatur.

Judgment may be ordered to be entered up, unless the retainer is disputed.[1]

By 6 & 7 Vic. c. 73, s. 43, with reference to the master's *allocatur*, it is enacted, that "payment of the amount certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount with costs, unless the retainer shall be disputed, and to make such other order therein as such court or judge shall deem proper."

(C) *Remedy for Costs awarded by Judgment.*[2]

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v. Jones, 11 Jur. 589. *Wheldale v. the Northern and Eastern Railway Co.* 13 Mee. & W. 9), the court will order a review of the taxation, provided the improper allowance be not of merely trifling amount. *Newton v. Boodle*, 4 C. B. 369. In addition to these grounds, the court has ordered the taxation to be reviewed on the ground that more than the proper allowance has been made by mistake, as where the plaintiff's attorney charged and the master allowed on taxation for more folios than the declaration in fact contained. *Morris v. Hunt*, 1 Chit. 544. And if the one party has taxed his costs against the other, without giving him notice of taxation, in a case where such notice ought to have been given, that constitutes a ground for a review. *Field v. Partridge*, 21 L. J. Ex. 269. *Taylor v. Murray*, 3 Mee. & W. 141.

Where the taxation is complained of on an objection which might have been but was not taken before the master, the court will be slow to interfere. *Hore v. Saxl*, 17 C. B. 599. And, as in other cases, the party urging the objection ought to come to the court within a reasonable time. *Sadler v. Evans*, 4 Burr. 1984.

Upon the motion to review, the affidavits ought distinctly to point to the particular objection, and to show that the attention of the officer was called to it. *Kent v. Great Western Railway Co.* 3 C. B. 714. *Daniel v. Bishop*, M'Clel. 61. *Aliven v. Furnival*, 2 Dowl. 49. And the court will not entertain the application until the master has made his *allocatur*, because previously thereto he has come to no final decision. *Selman v. Boon*, 8 Mee. & W. 552. *Cleaver v. Hargrave*, 2 Dowl. 689. Neither will the court direct the master as to the principle on which he is to proceed in taxing the costs before the taxation is completed. *Burton v. Burton*, 29 L. J. Ex. 291.

As to the costs of the motion for a review, if the rule is discharged it is in general discharged with costs. However, in a case of intricacy and doubt, the court will sometimes discharge the rule without costs. *Bartholomew v. Carter*, 4 Man. & G. 612. Where the court makes the rule absolute, the exercise of its discretion as to the costs of the rule is subject to these considerations; costs are given, or each party is left to pay his own costs, according as the justice of each particular case seems to demand. It is, however, a general rule, that if the ground of the review is a mistake of the master, the rule will be made absolute without costs. *Ward v. Bell*, 2 Dowl. 76. *Miller v. Thompson*, 4 Man. & G. 260. *Parsons v. Pitcher*, 6 Dowl. 600.

[1] A similar remedy is afforded by the 1 & 2 Vic. c. 100, s. 18, under which it was held, that where the order referring the bill to taxation contained an undertaking to pay what should be found due, the court would make an order that the client should pay that amount, with a view to turn the debt into a judgment-debt under the statute.

In order to induce the court or a judge to order judgment to be entered up, it is not necessary that there should be any writ or declaration whereon to found the judgment. *Griffiths v. Hughes*, 4 D. & L. 719. If there is a substantial objection to the amount allowed, on the ground that the attorney was guilty of negligence, the court will not allow him to enter up judgment. *Ex-parte Lowless*, 5 id. 793.

Notwithstanding a reservation in the order of reference of the right to dispute the retainer, if that question has, by consent of the parties, been adjudicated upon by the master, such reservation will afford no answer to an application by the attorney for leave to enter up judgment for the amount of the *allocatur*. *Ex-parte Lowless*, *supra*.

If the attorney proceed by way of attachment, it is necessary, before issuing the attachment, to obtain an order for payment of the amount certified to be due; and if that order be disobeyed, proceedings may then be had by making the order a rule of court, and moving for an attachment upon it. *In re Woodhouse*, 2 C. B. 290. *Ryalls v. Emerson*, 2 Dowl. 357. If there was a direction or undertaking in the order of reference for payment of the amount found by the master to be due, proceedings may be had by way of attachment for non-payment of such amount if default be made therein. *Ryalls v. Emerson*, *supra*. *Harrison v. Ward*, 3 Dowl. 541.

[2] Judgment is not considered to be final until after taxation of costs (*Pierce v. Derry*, 4 Q. B. 635), unless the party waive costs.

(D) *Remedies for Costs given by Rule of Court or Order of a Judge.*

1 & 2 Vic. c. 110, s. 18, enacts, "that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any monies or costs, charges, or expenses, are by such rules respectively directed to be paid." The same remedies may be pursued as on a judgment.[1]

COST-BOOK. *See* Joint-Stock Company; Mines.

COTTAGE.[2]

COTTON-FACTORY. *See* Factory.

COUNSEL. *See* Barrister, vol. ii. p. 373, *et seq.*

COUNSEL'S Opinion; how far it protects the Attorney.[3]

COUNSEL'S Signature, not required to Pleadings.

15 & 16 Vict. c. 76, s. 85. "The signature of counsel shall not be required to any pleadings."

COUNTERFEITING Money. *See* Coin, *ante*, p. 132, *et seq.*

COUNTERMAND. *See* Notice of Trial.

Field v. Partridge, 7 Ex. 689. The master having taxed the costs, fills up the amount on the *postea*. Where the judge presiding at the trial has certified for speedy execution, the judgment to be entered on the certificate includes the costs. *Smith v. Dickenson*, 5 Q. B. 602. Where the judgment has been completed by the entry of costs, execution may issue for the debt or damages, *and* costs, if in favour of the plaintiff, or for the costs if in favour of the defendant.

[1] The remedy by issuing execution may be followed, notwithstanding the amount of costs is not ascertained by the rule, but by the master of the court upon taxation after the rule is made; and it is not necessary that there should be any order to pay after they are taxed. *Reg. v. Hindecliffe*, 10 Q. B. 356. *Jones v. Williams*, 8 Mee. & W. 349. *Hobson v. Paterson*, 2 Dowl. N. S. 129. *Doe d. Harrison v. Hampson*, 5 D. & L. 484. *Wright v. Burrows*, 2 id. 94. If the cause has been referred to arbitration under a rule of court, the remedy by execution is not open until the party has been called upon to show cause why he should not pay the money pursuant to the award. *Burton v. Mendezabel*, 1 Dowl. N. S. 336. *Hawkins v. Benton*, 2 D. & L. 465. *Doe v. Amey*, 8 Mee. & W. 565.

[2] A small dwelling-house. "The grant of a cottage, it is said, passes a small dwelling-house that hath no land belonging to it." Shep. T. 94.

[3] A case for the opinion of counsel, properly framed, with an explicit opinion of an experienced counsel favourable to the subsequent proceedings, will, in general, afford protection to the attorney for any misapprehension on the advised right of the party. *Kemp v. Burt*, 1 Nev. & M. 262. *Potts v. Sparrow*, 6 Car. & P. 749. But a case stated in a hurried manner, without a full and accurate disclosure of all the facts, or a case stated so generally that the attention of counsel is not directed to the material points, will not afford a protection. *See* Chit. Gen. Pr. 22. Thus, if on consulting a counsel upon an abstract, a solicitor should take upon himself to draw a conclusion from deeds, and do not lay the deeds and the whole of the facts before the counsel, and should err in such conclusion, a jury might find a verdict against him for his negligence. 3 B. & C. 799; 5 D. & R. 587; 2 B. & C. 697; 5 Taunt. 281. See Attorney, *ante*, vol. ii. p. 23; *post*, Malicious Arrest; Malicious Pro-

COUNTERPART. What it is.[1] *See* Deed; Evidence; Lease.
(A) *To what extent Evidence.*[2]

COUNTRY Bankers. *See* Bankers, vol. ii. p. 119.

COUNTS. *See* Declaration; Indictment.

COUNTY.[3] *See* Indictment.

COUNTY Bridge. *See* Highways.

COUNTY Clerk.[4]

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secution.

[1] When a deed is in two parts, and each part is executed by one party only, the two instruments are called counterparts.

[2] Each counterpart is alternately the best evidence against the party sealing it, and those in privity with such party (*Mayor of Carlisle v. Blamire*, 8 East, 487. *Roe v. Davis*, 7 id. 363. *Paul v. Meek*, 2 Y. & J. 116. *Pearce v. Morrice*, 3 B. & Adol. 396. *Burleigh v. Stibbs*, 5 T. R. 465), and secondary evidence of the contents of the other part. *Munn v. Godbold*, 292; 11 B. Moore, 49. Thus, if a landlord brings an action for rent, he produces the counterpart executed by the tenant as original evidence; or in the event of its loss, he may have recourse either to the part sealed by himself, or to any other species of secondary proof (*Doe v. Ross*, 7 Mee. & W. 102. *Hall v. Ball*, 3 Man. & G. 242; 3 Scott, N. R. 577); but if the tenant is the person aggrieved, he must rely on the part delivered by the landlord, and that executed by himself will only be considered as secondary evidence. 1 Tayl. Ev. s. 311. With respect to the stamp, the counterpart signed by the lessor is usually deemed the original. See *Pearce v. Morrice*, 3 B. & Adol. 396. When produced as secondary evidence the counterpart will be admitted, though unstamped. *Munn v. Godbold, supra.*

[3] Anciently the *comites*, counts or earls, had the government of the counties, and afterwards the *vicecomites*, or sheriffs. And the county seems to be nothing else but the district of the *comes* or count. Shire is a Saxon word, from *scryan*, to share or divide; for that the shires and counties are divided by certain metes and bounds from each other. And the sheriff, in Saxon *syregeresa*, is the reve grave, or governor of the shire. 2 Burn's *Just.* 190.

By the 7 & 8 Vic. c. 61, it is enacted, that "every part of any county in England or Wales which is detached from the main body of such county, shall be considered for all purposes as forming part of that county of which it is considered a part, for the purposes of the election of members to serve in parliament as knights of the shire, under the provisions of 2 & 3 Wm. 4, c. 64: Provided always, that nothing herein contained shall be construed to alter the county, riding, or division, to which any such detached part shall be deemed to *belong*, for the purpose of holding inquests, under the provisions of 6 & 7 Vic. c. 12."

[4] A bond given by a county clerk to account, under the 12 Geo. 3, c. 29, will be construed to mean to account under other statutes also. *Fair v. Hollis*, 9 B. & C. 315.

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(B) *Of the Officers of the Court.*

(*a*) *Of the Judge; his Appointment, Salary, Duties, and Removal.*[3]

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[1] The county courts now in operation were established under the 9 & 10 Vic. c. 95, by an order of her Majesty in council, dated the 9th day of March, 1847. The act is entitled "An Act for the more Easy Recovery of Small Debts and Demands in England," and provides for the establishment of courts of local jurisdiction throughout England and Wales, dividing the various counties into distinct districts. In each of the districts, except in the metropolitan districts, the court is styled "The County Court of holden at ;" and in the metropolitan districts, "The County Court of ."

The expense of building and repairing court-houses, and the salaries of the necessary servants for taking charge of the court-houses and offices, and of supplying stationery, &c., is paid by the Commissioners of the Treasury out of monies from time to time provided by parliament for such purpose. 19 & 20 Vic. c. 108, s. 85. It has been held that a *mandamus* will not lie to the Lords Commissioners of the Treasury to compel them to pay a debt incurred in a county court; and this, even although parliament has, upon an estimate made by the Commissioners of the Treasury, voted a sum for the salaries and expenses of the county courts for the year. *In re Lords Commissioners of the Treasury, Ex-parte Walmsley*, 1 E. B. & S. 81.

The jurisdiction of these courts is confined to that which is conferred by statutes. The practice is regulated and forms of procedure prescribed by several statutes passed with that object, and by rules and forms framed by a committee of five county-court judges, and duly approved and promulgated in accordance with the act. *See* 19 & 20 Vic. c. 108, s. 32.

"In proceedings for which forms are not provided in the schedule to the rules, the registrars shall frame the forms required, using as guides those provided." Rule 196.

By an interpretation clause it is provided, "that in these rules the words 'home court,' shall mean the court from which process is originally issued; and the words 'foreign courts,' shall mean the court of the district into which process is issued from another court; and the words 'home district,' shall mean the district of the home court; and the words 'foreign district,' shall mean the district of the foreign court; and the words 'on oath,' shall mean 'on oath *vivâ voce* or by affidavit;' and unless there be something in the context inconsistent therewith, the provisions of s. 142 of 9 & 10 Vic. c. 95, shall apply to the interpretation of these rules." Rule 4.

The provisions of the County Courts Acts, applicable to the superior courts apply to the Court of Common Pleas at Lancaster, and Court of Pleas at Durham. 19 & 20 Vic. c. 108, s. 86.

[2] "Every judge shall appoint the days and hours for holding his court, and a notice of the day and hour on which each court will be holden shall, three calendar months before the holding thereof, be affixed in some conspicuous place in the court-house, and in the registrar's office; and whenever any day or hour so appointed for holding the court shall be altered, notice of such alteration shall immediately be posted in like manner; but any judge may from time to time hold additional and adjourned courts." Rule 2.

"Two courts shall not be holden before the same judge on one day, unless with the consent of the Lord Chancellor, but this rule shall not apply to the holding of an adjourned court." Rule 3.

[3] The county-court judges are appointed by the Lord Chancellor. 9 & 10 Vic. c. 95, s. 9. By s. 3, of 9 & 10 Vic. c. 95, it is enacted, that "there shall be a judge for each district to be created under this act." Commenting on this provision, it has been said: "No doubt can be entertained that the jurisdiction of each judge may, by his appointment, be limited to one district, and so there may be many judges of one county court, having no joint or co-ordinate jurisdiction: and it was to meet such a case that the latter part of the third section provided for holding the county courts simultaneously in all or any of the districts. That part of the section was necessary to meet the case of several judges being appointed for the

same county, but it by no means involves the proposition that they must be so appointed. Nor do the words, 'there must be a judge for each district,' necessarily involve any such proposition, but only that the judge who shall hold the county court in each district shall be designated and particularly appointed to that district, so that there shall not be two or more judges of the same county court who may hold the court in any given district." *Reg. v. Parham*, 13 Q. B. 858; 18 L. J. Q. B. 281.

By the 19 & 20 Vic. c. 108, s. 81, the salaries of judges in future are fixed at a uniform rate of 1200*l.* a-year; the salaries of such judges as were then in receipt of 1500*l.* being retained: but nothing in that act contained is to affect the title of any county-court judge to receive any sum then or thereafter to be made payable to him for defraying his travelling expenses. As to the salaries of judges appointed before this act, *see* 15 & 16 Vic. c. 54, s. 14, and schedule. The salaries of the judges are paid out of the consolidated fund: sums allowed for travelling expenses out of monies voted by parliament for that purpose. 19 & 20 Vic. c. 180, s. 80.

Until parliament shall otherwise direct, the judges of the county courts shall not exceed sixty in number. 19 & 20 Vic. c. 74, s. 3. *See* 24 & 25 Vic. c. 134, s. 5, *infra*.

The Lord Chancellor may, on the petition of a judge disabled by a permanent infirmity, order that he shall receive a retiring pension, not exceeding two-thirds of his salary. 15 & 16 Vic. c. 54, s. 15.

The Lord Chancellor may from time to time alter the distribution of the districts among the judges of county courts, and for that purpose may remove any judge of a county court from all or any of the districts of which he is judge, for the purpose of appointing him to any other district or districts, or appoint any such judge to be the judge of any district or districts, in addition to the district or districts of which he is the judge. 21 & 22 Vic. c. 74, s. 1.

Further, the Lord Chancellor may from time to time appoint two persons to be the judges of a district or districts, and may make such regulations as to their respective sittings or otherwise as to the division of their duties as he may think right; and each of the persons, when acting as such judge, shall have all such powers and authorities as if he had been sole judge of such district. (Id. s. 2.)

As to the Qualification necessary for a judge, it is enacted by the 9 & 10 Vic. c. 95, s. 16, "that from time to time when any judge appointed under this act shall die, resign, or be removed, and the district for which he was appointed shall not be consolidated with any other district, another judge shall be appointed who shall be a barrister-at-law who shall be of seven years' standing, or who shall have practised as a barrister and special pleader for at least seven years, or who shall have been the county clerk of the same county at the time of the passing of this act; and every such appointment shall be made by the Lord Chancellor, or, where the whole of the district is within the duchy of Lancaster, by the Chancellor of the Duchy of Lancaster."

9 & 10 Vic. c. 95, s. 17, enacts, "that no judge appointed under this act shall, during his continuance as such judge, practise as a barrister within the district for which his court is holden under this act, except those barristers already appointed to preside in or hold the said courts in certain specified places, and county-court judges are now prohibited from practising at the bar, or as special pleaders or equity draftsmen, or being directly or indirectly concerned as conveyancers, notaries public, solicitors, attornies, or proctors." 15 & 16 Vic. c. 54, s. 16. The 5 sect. of 24 & 25 Vic. c. 134, enables the Chancellor to create additional county courts. *See* vol. ii. p. 150.

As to the Duties of the Judge, the 9 & 10 Vic. c. 95, s. 56, enacts, "that the judge of each district shall attend and hold the county court at each place where her Majesty shall have ordered that the county court shall be holden within his district, at such times as he shall appoint for that purpose, so that a court shall be holden in every such place once at least in every calendar month, or such other interval as one of her Majesty's principal secretaries of state shall in each case order; and notice of the days on which the court will be holden shall be put up in some conspicuous place in the court-house, and in the office of the clerk of the court, and no other notice thereof shall be needed; and whenever any day so appointed for holding the court shall be altered, notice of such intended alteration, and of the time when it will take effect, shall be put up in some conspicuous place in the court-house, and in the clerk's office.

The judge is bound to pay implicit obedience to the process of the superior courts. Disobedience is a contempt, and exposes him to an attachment. Bac. Abr. Prohibition. Where the disobedience to a writ of *certiorari* originated in a mistaken construction of a clause in an act of parliament, the court nevertheless made absolute a rule for an attachment against the county-court judge; at the same time, however, directing that it should be in the office for a month: and they declined to make him pay the costs. *Mungean v. Wheatley*, 6 Ex. 88; 20 L. J. Ex. 108. Where the writ of *certiorari* having been served at the clerk's office did not come to the knowledge of the judge until after the return day, the court discharged a rule for an attachment. *Brookman v. Wenham*, 20 L. J. Q. B. 278.

A criminal information against a county-court judge was denied where it appeared that, before the application to the Queen's Bench, a memorial had been addressed to the Lord Chancellor for the removal of the judge for the same alleged misconduct, and the Lord Chancellor had declined to interfere. *Reg. v. Marshall*, 4 E. & B. 475; 24 L. J. Q. B. 242.

(1) *Of his Deputy.*[1]

(*b*) *Of the Registrar; his Appointment, Salary, Duties, and Removal.*[2]

It has been held that the act of the Chancellor of the Duchy of Lancaster, in dismissing a judge of a county court within the duchy, by a formal instrument pursuing the words of the statute, is not conclusive, but may be questioned on motion to the court of Queen's Bench for a *quo warranto* against the judge appointed in his place; and that it is competent for the applicant to show on such motion that he was removed without notice of any charge against him, or that no evidence was adduced in support of the charges, or that the complaints alleged were not for inability or misbehaviour in the exercise of his office as judge, or were of such a nature as, if proved, would not amount to inability or misbehaviour within the meaning of the act. *Ex-parte Ramshay*, 18 Q. B. 173; 21 L. J. Q. B. 238.

County-court judges are disqualified from being elected or sitting as members of the House of Commons, during their continuance in such office. 10 & 11 Vic. c. 102, s. 18.

[1] In case of illness or unavoidable absence of the judge, the judge himself, or in case of his inability to make such appointment, the Lord Chancellor or the Chancellor of the Duchy of Lancaster respectively may appoint a deputy, such appointment to continue only during such illness or unavoidable absence. And without assigning any cause the judge may, with the approval of the Lord Chancellor or the Chancellor of the Duchy of Lancaster respectively, appoint a deputy "to act for him for any time or times not exceeding two calendar months in any consecutive period of twelve calendar months." 9 & 10 Vic. c. 95, s. 20.

A deputy-judge must be a barrister of seven years' standing, or have practised as a barrister and special pleader for at least seven years, or be a judge of a county court. 19 & 20 Vic. c. 108, s. 6.

The office of deputy is not vacated by the death of the judge, but he continues to act until superseded by the new judge, or the Lord Chancellor orders otherwise. 19 & 20 Vic. c. 108, s. 11.

The deputy-judge, while he acts or is entitled to act as such, is prohibited from practising as a barrister within the district. 13 & 14 Vic. c. 61, s. 3.

[2] By the 8th sect. of 19 & 20 Vic. c. 108, the clerk of a county court is to be thereafter called the registrar, and no person is to be appointed registrar of more than one court.

The registrar must be an attorney of one of the superior courts. He cannot be appointed for more than one district, unless the Lord Chancellor deem it expedient to order otherwise. 15 & 16 Vic. c. 54, s. 17.

The registrars are paid by salaries. The principle on which the salaries are regulated is as follows: —

The registrar of each court in which the plaints entered do not exceed the number of 200 in a year, has an annual salary of 120*l.*; where they exceed 200, the salaries are increased by 5*l.* for every 25 plaints, up to 1000 plaints, inclusive. Such salaries are inclusive of all salaries to the clerks employed by the registrar in the business of their respective courts, and of all emoluments whatsoever, except those receivable by them in proceedings in insolvency or protection. In courts in which the number of plaints exceed 6000, the amount of salary is fixed by the commissioners, with the consent of the Lord Chancellor, but it can in no case exceed 700*l.* a-year. 19 & 20 Vic. c. 108, s. 82. As to the salaries of registrars appointed before 15 & 16 Vic. c. 54, *see* s. 14 of that act. *See* Bankruptcy, vol. ii. p. 153, 333.

The registrar and his deputy must reside within the district of the court. 13 & 14 Vic. c. 61, s. 3.

With regard to his Duties, the 9 & 10 Vic. c. 95, s. 27, enacts, "that the clerk of each court, with such assistant clerks as aforesaid in cases requiring the same, shall issue all summonses, warrants, precepts, and writs of execution, and register all orders and judgments of the said court, and keep an account of all proceedings of the court, and shall take charge of and keep an account of all court fees and fines payable or paid into court, and of all monies paid into and out of court, and shall enter an account of all such fees, fines, and monies in a book belonging to the court, to be kept by him for that purpose, and shall from time to time, at such times as shall be directed by order of the court, submit his accounts to be audited or settled by the treasurer."

And by 9 & 10 Vic. c. 95, s. 55, it is enacted, "that the clerk of every court shall have the care of the court-house and offices of the court, and shall appoint and have power to dismiss the necessary servants for taking charge of such court-house and offices, at such salaries as shall be from time to time authorised by the judge, with the consent of the Commissioners of her Majesty's Treasury; and the clerk of the court, under the direction of the said commissioners, and subject to such regulations as they may require to be enforced, shall make all necessary contracts, or otherwise provide for repairing and furnishing, and for cleaning, lighting, and warming the said court-house and offices, and for supplying the said court-house and offices with law and office-books and stationery, and for defraying all necessary expenses, not otherwise provided for, incident to the holding of the said court; and the charge of the court-house and offices, and expenses thereby incurred, shall be paid out of the general fund of the court: Provided always, that the treasurer or clerk, or any person in the service or employment of any such treasurer or clerk, shall not be directly or indirectly concerned or interested

in any such contract, or in supplying any articles for the use of the said courts and offices: Provided also, that no payment for any such charge shall be allowed in the clerk's accounts, until allowed under the hand of the judge."

The duties of the registrar are further enumerated in the 6th and succeeding rules to the 20th of the General Rules and Orders:—

By the 6th rule, the registrar shall keep an office in each place where the court of which he is registrar is holden, and such office shall be kept open every day from ten o'clock in the morning until four o'clock in the evening, except on Christmas Day, Good Friday, or any day appointed by royal proclamation for a public fast, humiliation, or thanksgiving, and except also on Saturday, on which day the office may be closed at one o'clock in the afternoon: Provided always, that where Saturday is the market-day of the town in which the court is holden, the office may be closed at one o'clock on some other day instead of Saturday, and when any day is fixed upon for such purpose, it shall not afterwards be changed, except by leave of the judge.

7. The registrar shall keep the books in the forms set forth in the schedule, and every entry in such books shall have a number prefixed corresponding with the number of the plaint to which the entry relates.

8. Whenever the registrar or his lawful deputy is absent from the court, the judge shall appoint a deputy to act on behalf of the registrar, and an entry of such appointment, and the cause of such absence (if known), shall be made on the minutes of the court.

9. Whenever a registrar appoints a deputy, the reason of such appointment shall be entered on the minutes of each court for which such deputy acts.

10. The duties of acting in court as registrar, signing the minute-book, taking affidavits, granting permission to sue under s. 15 of 19 & 20 Vic. c. 108, and acting under the Summary Procedure on Bills of Exchange Act, 1855, shall be performed by the registrar, or by his lawful deputy.

11. The registrar of the court shall issue all summonses and warrants to the bailiffs forthwith after the plaints are entered, or warrants applied for.

12. Where a summons is required to be served in a foreign district, the registrar shall transmit the same, and a copy thereof, to the bailiff of the foreign court, with a letter, according to the form in the schedule, unless the judge of the home court shall order the summons in that particular case to be served by the bailiff of the home court; and if the summons be returned to the registrar by the high-bailiff of the foreign court not served, the registrar shall forthwith give notice to the plaintiff of such non-service.

13. The registrar shall, in all cases where a summons is to be served in a foreign district, require the plaintiff to pay the fee of one shilling for the oath, under s. 62 of 9 & 10 Vic. c. 95, and shall pay over the same to the treasurer of his court, at such times and in such manner as may be directed by the Commissioners of her Majesty's Treasury.

14. The registrar shall, when, by these rules, particulars are required, annex to the summons a copy of the plaintiff's particulars, sealed with the seal of the court, and shall also make and deliver to the bailiff a true copy of the summons for indorsement, as required by rule 25.

15. The registrar shall enter in the notice-book all notices and letters sent by him, and all particulars required by the form of such book.

16. Searches may be made, and the money to which suitors are entitled shall be paid out on demand (in cash, if required), on three days, at the least, in each week, such days to be fixed by the registrar from time to time, with the approbation of the judge, and to be printed or written on the plaint note: Provided, that for the purpose of enabling the registrar to furnish the list of balances in the ledger, according to the requirements of the Commissioners of her Majesty's Treasury, no searches shall be made or money paid out of court during one week in each year, of which due notice shall be affixed in some conspicuous place in the office of the registrar.

17. Whenever money is paid into or deposited in court, whether before or after judgment, an acknowledgment in writing of such payment or deposit shall be given on the summons, or on the order, but such acknowledgment need not bear a receipt-stamp.

18. All the books of the court, including the banker's book and cash-book, shall at all times be open to the inspection of the treasurer.

19. No registrar, deputy-registrar, registrar's clerk, bailiff, broker, or other officer of the court, and no partner or clerk of any such officer, shall, on account of suitors, sign the ledger, or any other book, or receive money, or otherwise act as an agent for that purpose.

20. No registrar, deputy-registrar, registrar's clerk, bailiff, broker, or other officer of the court, or any practising attorney or clerk of such attorney, shall become surety in any case where, by the practice of the court, security is required.

The registrar and high-bailiff are bound to deliver quarterly accounts of fees to the treasurer. 15 & 16 Vic. c. 54, s. 9. And he must pay over to the treasurer of the court quarterly, or oftener, in every year, as may be directed by the Commissioners of the Treasury, the monies remaining in his hands over and above his own fees, and such balance as he shall be allowed, by order of the commissioners, to retain for the current expenditure of the court. 12 & 13 Vic. c. 101, s. 7. *See* Bankruptcy and Insolvency, vol. ii. p. 152, 333.

As to the audit of the registrar's accounts, *see* 15 & 16 Vic. c. 54, s. 8.

The registrar is removable by the Lord

(1) *Of his Deputy.*[1]

(c) *Of the High-Bailiff; his Appointment, Salary, Duties, and Removal.*[2]

Chancellor at his discretion. 13 & 14 Vic. c. 61, s. 4. Formerly the judge had authority to remove him for misconduct (9 & 10 Vic. c. 95, s. 24. *Reg. v. Owen*, 15 Q. B. 476; 19 L. J. Q. B. 490); but this power he no longer possesses.

[1] The registrar is empowered with the approval of the judge, or, in case of the inability of the registrar to make such appointment, it is lawful for the judge to appoint from time to time a deputy, qualified to be appointed registrar of the said court, to act for the registrar of the said court at any time when he shall be prevented by illness or unavoidable absence from acting in such office, and to remove such deputy at his pleasure; and such deputy while acting under such appointment has the like powers and privileges, and is subject to the like provisions, duties, and penalties for misbehaviour, as if he were the registrar of the court for the time being. 9 & 10 Vic. c. 95, s. 26.

And "whenever the registrar or his lawful deputy is absent from the court, the judge shall appoint a deputy to act on behalf of the registrar, and an entry of such appointment, and the cause of such absence (if known), shall be made on the minutes of the court." Rule 8.

"Whenever a registrar appoints a deputy, the reason of such appointment shall be entered on the minutes of each court for which such deputy acts." Rule 9.

The deputy continues to act after the death or removal of the registrar, until the appointment of his successor. 19 & 20 Vic. c. 108, s. 12. If there be no deputy, upon the death of the registrar the judge is empowered to appoint a deputy for a period not exceeding three months, to act until a permanent successor is appointed. 19 & 20 Vic. c. 108, s. 13.

[2] The high-bailiff is appointed by the judge.

By s. 31 of 9 & 10 Vic. c. 95, it is enacted, "that for every such court there shall be one or more high-bailiffs, whom the judge shall be empowered by order of court to appoint, and in case of inability or misbehaviour, to remove by a like order."

As to high-bailiffs of Westminster and Southwark, *see* s. 32.

By s. 36, the high-bailiffs are required "to give security for such sum, and in such manner and form, as the Commissioners of her Majesty's Treasury from time to time shall order, for the due performance of their several offices, and for the due accounting for and payment of all monies received by them under this act, or which they may become liable to pay for any misbehaviour in their office." See *Pybus v. Gibbs*, 6 E. & B. 902.

The high-bailiffs are paid by salaries fixed and regulated from time to time by the Commissioners of the Treasury, with the consent of the Lord Chancellor, and in addition to such salaries they receive for their own use the fees appointed for keeping possession of goods under executions; and such salaries include all payments made by the high-bailiffs to their under-bailiffs; or, with the like consent, the high-bailiffs may be paid partly by salaries and partly by allowances for the execution of warrants, and for mileage on the service or execution of any process. 19 & 20 Vic. c. 108, s. 83.

The Duties of the High-bailiff are enumerated in the 21st and succeeding rules to the 32d of the General Rules and Orders.

Rule 21st orders that whenever the high-bailiff does not attend any sitting of the court, the cause of his absence shall be entered by the registrar in the minutes of the next succeeding court.

22. The high-bailiff shall keep books and make returns in the form set forth in the schedule.

23. The high-bailiff, or an under-bailiff of the court, shall attend for the purpose of receiving summonses, or for the performance of other duties, at the office of the registrar, once, at least, every day, and shall compare and examine the copy of each summons delivered to him by the registrar, so as to enable him to prove its correctness.

24. The high-bailiff shall serve, or cause to be served, process sent to him for service from other courts, and when he shall be unable to swear the affidavit of service or non-service before the judge or registrar, he shall be repaid by the treasurer of his court the one shilling paid by him to the commissioner for taking the affidavit.

25. If the service of the summons has been personal, the bailiff who served the same shall indorse on the copy of the summons delivered to him by the registrar the fact and mode of such service, and if the same has not been personal, he shall indorse on the copy of the summons the statement which has been made by the person to whom the summons was delivered, or other circumstances from which it may be inferred that the service of the summons has come to the knowledge of the defendant; and if the summons has not been served, the bailiff shall indorse on such copy the fact, and the reason of such non-service, and shall deliver it to the registrar with the list of summonses mentioned in the next rule but one, unless the judge shall otherwise order, and such copy shall be produced at the time of the trial by the registrar or high-bailiff, as the judge may require.

26. Where the summons is required to be served in a foreign district by the bailiff of that district, he shall, nine days at least, be-

fore the return day of the summons, transmit the copy thereof to the registrar of the home court, with an affidavit of the service, if the summons has been served; and if it has not been served he shall return the summons, with an affidavit stating why it has not been served, and the affidavit shall state the same particulars as to service or non-service as are required by the last rule, to be indorsed on a summons; and if such affidavit be defective, the bailiff shall amend the same at his own expense, in conformity with the direction of the judge of the home court.

27. Eight days before the day of holding any court, the high-bailiff shall deliver to the registrar a list of all summonses or plaints before judgment issued to him, returnable at such court, and such return shall state the mode of service, or the cause of non-service of each summons; and the high-bailiff shall, at the same time, unless the judge shall otherwise order, deliver to the registrar the copy of every summons which has been served, and the summons itself when not served.

28. When a summons has not been served, and the summons remains in the hands of the bailiff, he shall, at the time of making out the list aforesaid, give notice to the plaintiff of the fact of such non-service in the form set forth in the schedule.

29. The high-bailiff shall enter in the order-book all orders for the payment of money or costs, or both, which he shall have received, and the date on which he shall have caused the same to be posted.

30. The high-bailiff shall enter in the high-bailiff's warrant-book every warrant which he has been required to execute, and shall state from time to time therein what he shall have done under each warrant, and if the same be not executed within one calendar month from the day of its delivery to him, why it was not executed; and the high-bailiff shall at all reasonable times give to a suitor every information that he may reasonably require as to the execution or non-execution of every warrant which has been issued at his instance.

31. Every bailiff levying or receiving any money by virtue of any process issuing out of the court of which he is bailiff shall, within twenty-four hours from the receipt thereof, pay over the same to the registrar of such court, and shall file such process, and retain the same in his custody.

32. Whenever a warrant required to be executed in a foreign district has not been executed within one calendar month from the day of its delivery, the bailiff of the foreign court shall, on the day after the termination of such month, make a return to the registrar of the home court of what he shall have done under such warrant, and why it has not been executed; and when the same warrant has not been executed during the time that it is in force, such bailiff shall return the same to the registrar of the home court within twenty-four hours from the expiration of such time, and shall indorse on such warrant the reason why the same could not be executed, and he shall sign such indorsement; but the bailiff shall return such warrant to the home court at any time, though unexecuted, if he shall be directed to do so by the registrar of the home court, or shall give such information as such registrar may require in the matter of the warrant.

[1] The high-bailiff may, by any writing under his hand, appoint a sufficient number of able and fit persons, not exceeding such number as shall be from time to time allowed by the judge, to be bailiffs, to assist such high-bailiff, and at his pleasure to dismiss all or any of them, and to appoint others in their stead; and every bailiff so appointed may also be dismissed or suspended by the judge. 9 & 10 Vic. c. 95, s. 31.

The judge may, by writing under his hand, authorise any of the bailiffs appointed by the high-bailiff to act as brokers or appraisers, for the purpose of valuing any goods, chattels, or effects taken in execution. 12 & 13 Vic. c. 101, s. 10.

The office of the bailiffs is not vacated by the death or removal of the high-bailiff; but they continue to act until dismissed by his successor or by the judge. 19 & 20 Vic. c. 108, s. 4.

[2] By the 23d section of 9 & 10 Vic. c. 95, the Commissioners of the Treasury are directed to appoint so many persons as they shall think fit to be treasurers of the county courts, and may remove any such treasurer, if they shall see occasion so to do, and appoint another person in his room. The treasurer is paid by salary, in such manner, and to such amount, as the commissioners from time to time order it. No qualification for the office of treasurer is specified.

By sect. 36 it is enacted, that the treasurers shall give security for such sum, and in such manner and form, as the Commissioners of the Treasury from time to time shall order, for the due performance of their several offices, and for the due accounting for, and payment of, all monies received by them under this act, or which they may become liable to pay for any misbehaviour in their office.

The treasurer is required by this act to audit the accounts of the registrar and other officers of the court (sects. 41, 42); to render accounts to the audit (sect. 43), which are to be audited under the power of 25 Geo. 3, c. 52 (sect. 45). With the approval of the secretary of state, to provide court-houses, offices, &c. (sect. 48). To purchase land for county-court purposes, and also to borrow money for such purposes (sects. 50–

(e) *Offices of Registrar, Treasurer, and High-Bailiff, cannot be combined in one Person;*[1] *and no Officer can act as Attorney or Agent for any Party to a Suit in the Court.*

(C) *Of the Means of enforcing Performance of the Duties of the Officers of the Court.*

(a) *The Judge or Officer may be required by Rule or Order of one of the Superior Courts to perform a Duty under pain of Attachment.*

The judge or officer may be required by rule or order of one of the superior courts to perform a duty under pain of attachment.

9 & 10 Vic. c. 108, s. 43. "No writ of *mandamus* shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior court or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to show cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shown, the superior court or judge thereof may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order, shall obey the same on pain of attachment; and in any event the superior court or the judge thereof may make such order with respect to costs as to such court or judge shall seem fit."[2]

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54). See further as to his duties, the "Instructions issued by the Commissioners of Her Majesty's Treasury to the Treasurers of County Courts," January, 1857, & 30 L. J. Ex. 145; 6 H. & N. 383.

[1] 9 & 10 Vic. c. 95, s. 28. "It shall not be lawful for the clerk of any court holden under this act, or the partner of any such clerk, or any person in the service or employment of such clerk or his partner, to act as treasurer or high-bailiff of the court; or for the treasurer, his partner or clerk, or any person in the service or employment of such treasurer or his partner, to act as clerk or high-bailiff; or for the high-bailiff, his partner or clerk, or any person in the service or employment of such high-bailiff or his partner, to act as clerk or treasurer of the court."

Sect. 29. "No clerk, treasurer, high-bailiff, or other officer of the court, shall, either by himself or his partner, be directly or indirectly engaged as attorney or agent for any party in any proceeding in the said court."

Sect. 30. "Every person who, being the clerk of any such court, or the partner of such clerk, or a person in the service or employment of any such clerk or of his partner, shall accept the office of treasurer or high-bailiff of such court, or who, being the treasurer of any such court, or the partner of any such treasurer, or a person in the service or employment of any such treasurer or of his partner, shall accept the office of clerk or high-bailiff in the execution of this act, or who, being the high-bailiff of such court, or the partner of any such high-bailiff, or a person in the service or employment of any such high-bailiff or of his partner, shall accept the office of clerk or treasurer in the execution of this act, and also every clerk, treasurer, high bailiff, or other officer of any such court who shall be, by himself or his partner, or in any way, directly or indirectly, concerned as attorney or agent for any party in any proceedings in the said court, shall for every such offence forfeit and pay the sum of fifty pounds to any person who shall sue for the same in any of her Majesty's superior courts of record, by action of debt or on the case."

The applying for a warrant from a county-court judge under the 14 & 15 Vic. c. 52, to arrest an absconding debtor, is not a proceeding in the county court within 9 & 10 Vic. c. 95, s. 29, so as to render the high-bailiff of the court liable to a penalty for acting as attorney in the application. *Warden v. Stone*, 26 L. J. Q. B. 200; 21 Jur. 491.

It has been held, that an assistant-clerk was liable to a penalty under sect. 30 for practising in the court where he acts as assistant. *Rex v. Edge*, 12 Q. B. 936; 19 L. J. Q. B. 6.

[2] Previous to the above statute county-court judges might be compelled by *mandamus* to entertain jurisdiction, or to do any act which it was obligatory to perform. Thus where, in the case of an interpleader summons, the county-court judge has erroneously held that the particulars were insufficient, and on this ground dismissed the plaint, he has been compelled by *mandamus* to entertain jurisdiction, and hear the case upon the merits. *Reg. v. Stapylton*, 21 L. J. Q. B. 8. *Reg. v. Richards*, 20 id. 351. But if he has decided the case upon the merits, however erroneous the conclusion to which he arrived may have been, no *mandamus* would issue to compel him to rehear the case. *Milner v. Rhoden*, 15 Jur. 1037.

It seems in analogy with the practice in *mandamus* that a rule requiring the issuing of execution in the county court should be directed to the registrar, and not to the judge. *Reg. v. Fletcher*, 2 E. & B. 279. *Ex parte Overseers of Christchurch*, 2 Pr. Rep. 660.

(*b*) *If Bailiff neglects to Levy, he may be required to pay Damages to Party Injured by such Neglect.*[1]

(*c*) *Officer guilty of Extortion may be ordered to Refund, and Fine imposed.*[2]

(D) *Of the Protection afforded to Officers acting in Prosecution of their Duties.*[3]

(*a*) *Action must be brought in County where Act committed within Three Months.*

(*b*) *A Month's Notice of Action must be given.*

Action for act done must be tried in county where committed, and action must be commenced within three months, and one month's

9 & 10 Vic. c. 95, s. 138. "And for the protection of persons acting in the execution of this act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within three calendar months after the fact committed, and not afterwards, or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and no plaintiff shall recover in any such action

[1] 9 & 10 Vic. c. 95, s. 115, enacts, "that in case any bailiff of the said court who shall be employed to levy any execution against goods and chattels shall, by neglect, or connivance, or omission, lose the opportunity of levying any such execution, then, upon complaint of the party aggrieved by reason of such neglect, connivance, or omission (and the fact alleged being proved to the satisfaction of the court on the oath of any credible witness), the judge shall order such bailiff to pay such damages as it shall appear that the plaintiff has sustained thereby, not exceeding in any case the sum of money for which the said execution issued, and the bailiff shall be liable thereto; and upon demand made thereof, and on his refusal so to pay and satisfy the same, payment thereof shall be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court."

[2] 9 & 10 Vic. c. 95, s. 116, enacts, "that if any clerk, bailiff, or officer of the court, acting under colour or pretence of the process of the said court, shall be charged with extortion or misconduct, or with not duly paying or accounting for any money levied by him under the authority of this act, it shall be lawful for the judge to inquire into such matter in a summary way, and for that purpose to summon and enforce the attendance of all necessary parties, in like manner as the attendance of witnesses in any case may be enforced, and to make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied as aforesaid, and for the payment of such damages and costs, as he shall think just; and also, if he shall think fit, to impose such fine upon the clerk, bailiff, or officer, not exceeding ten pounds for each offence, as he shall deem adequate; and in default of payment of any money so ordered to be paid, payment of the same may be enforced by such ways and means as are herein provided for enforcing a judgment recovered in the said court."

Sect. 117 enacts, "that every treasurer, clerk, bailiff, or other officer employed in putting this act or any of the powers thereof in execution, who shall wilfully and corruptly exact, take, or accept any fee or reward whatsoever, other than and except such fees as are or shall be appointed and allowed respectively as aforesaid, for or on account of any thing done or to be done by virtue of this act, or on any account whatsoever relative to putting this act into execution, shall, upon proof thereof before the said court, and in the case of a clerk, treasurer, or high-bailiff, on allowance of the finding of the court by the Lord Chancellor, be for ever incapable of serving or being employed under this act in any office of profit or emolument, and shall also be liable for damages as herein provided."

[3] 9 & 10 Vic. c. 95, s. 137, enacts, "that where any distress shall be made for any sum of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant of distress, or other proceeding relating thereto, nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity which shall afterwards be committed by the party so distraining, but the person aggrieved by such irregularity may recover full satisfaction for the special damage in an action upon the case."

The registrar is not liable to an action of trespass for an act done in obedience to an order of the judge, although such order may be invalid. *Dews v. Riley*, 11 C. B. 434; 20 L. J. C. P. 264. As to the liability of the high-bailiff for the acts of his assistants, *see post*, p. 346. As to treasurer break-

notice of action given.[1]

if tender of sufficient amends shall have been made before such action brought, or if after action brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant."

(c) The Defendant may plead the General Issue and give the Special Matter in Evidence.

The defendant may plead the general issue and give the special matter in evidence.

By 15 & 16 Vic. c. 54, s. 6, "if any action or suit shall be brought against any person for anything done in pursuance of this act, or of any other act relating to county courts, such person may plead the general issue and give the special matter in evidence; and the warrant under the seal of the county court being produced in any such action or suit, shall be deemed sufficient proof of the authority of the said county court previous to the issuing of such warrant; and in case the plaintiff in such action shall have a verdict pass against him, be nonsuit, or discontinue the action or suit, the defendant shall in any of the said cases be allowed full costs as between attorney and client." *See* 30 L. J. Ex. 145; 6 H. & N. 383.

(d) In Actions against the Bailiff, or any person acting in his aid, a Perusal and Copy of the Warrant must be demanded, &c.

In actions against the bailiff or any person acting in his aid, a perusal and copy of the warrant must be demanded, &c.[2]

The 13 & 14 Vic. c. 61, s. 19, enacts, that "no action shall be brought against any high-bailiff or bailiff, or against any person or persons acting by the order and in aid of any high-bailiff, for anything done in obedience to any warrant under the hand of the clerk or clerks of the said court, and the seal of the said court, until demand hath been made or left at the office of such high-bailiff by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or

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ing open doors of registrar's office, *see* 30 L. J. Ex. 145.

[1] In an action of trespass against a county-court judge for proceeding to commit the plaintiff after prohibition, *Jervis, C. J.*, told the jury that "if the defendant, in trying the cause and making the order, acted under a *bonâ fide* belief that his duty as judge of the county court made it incumbent on him to do so, notwithstanding the prohibition that issued out of the Petty-Bag Office, the act done by him must be considered as done in pursuance of the County Court Acts, and he was entitled to notice of action; and it was for them to say whether the defendant reasonably believed that he was so entitled to act; and that if reasonably meant anything else than good faith, it meant according to reason, in contradistinction to acting capriciously." The court supported this direction. *Booth v. Clive*, 10 C. B. 827.

The bailiff is entitled to notice of action where he has seized the goods of the wrong person, acting under the process of the court. *White v. Morris*, 11 C. B. 1015; 21 L. J. C. P. 185.

A notice is not vitiated by reason of its purporting to be under a wrong statute. *Macgregor v. Galsworthy*, 3 C. & Kir. 8. *See post*, Notice of Action.

[2] The liability of the high-bailiff for the acts of his assistants is confined to acts done by virtue of process issuing out of, or sealed by, the court of which he is bailiff, in order to be executed within the district. Thus, where a warrant issues upon a warrant of a county court against a party resident in another jurisdiction, and is sealed by the clerk of the court there, under the 104th sect. the high-bailiff of the court out of which the warrant originally issued is not responsible for any irregularities in its execution by the under-bailiff of the foreign court, even though his own under-bailiff assists him. *Smith v. Pritchard*, 8 C. B. 565. The high-bailiff is not responsible for an assault committed by the under-bailiff, unless it be immediately in execution of process. Thus, where the under-bailiffs broke and entered certain premises, under the mistaken belief that a person, against whom a warrant was directed, was to be found there; and upon the owner of the premises resisting their entry they took him into custody, and carried him before a magistrate; the court held the high-bailiff liable for the wrongful entry, but not responsible for the assault, the authority given to officers by sect. 114 being permissive merely. *Smith v. Pritchard, supra.*

Judgment having been obtained in the county court, and in default of payment a judgment summons was issued, which the party did not attend, and the judge made an order of committal for seven days, under which the debtor was arrested. After the warrant was issued, and before it was executed, he had paid the debt and costs to his creditor, who wrote a letter to the registrar informing him of the circumstance. It was held that an action would not lie against the high-bailiff, as the order and warrant

neglected by the space of six days after such demand; and in case after such demand and compliance therewith, by showing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such high-bailiff, bailift, or other person or persons acting in his aid for any such cause as aforesaid, without making the clerk or clerks of the said court who signed or sealed the said warrant defendant or defendants, that on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction or other irregularity in the said warrant; and if such action be brought jointly against such clerk or clerks, and also against such high-bailiff or bailiff, or person or persons acting in his or their aid as aforesaid, then on proof of such warrant the jury shall find for such high-bailiff or bailiff, and for such person or persons so acting as aforesaid, notwithstanding such defect or irregularity as aforesaid; and if the verdict shall be given against the said clerk or clerks, that in such case the plaintiff or plaintiffs shall recover his, her, or their costs against him or them, to be taxed in such manner by the proper officer as to include such costs as such plaintiff or plaintiffs are liable to pay to such defendant or defendants for whom such verdict shall be found as aforesaid; and if any action shall be brought the defendant or defendants shall and may plead the general issue, and give the special matter in evidence at any trial had thereupon."

(*e*) *Persons Assaulting Officers of Court are liable to a Fine.*[1]

(E) *Of Contempt of Court.*[2]

(F) *Who may Practise in the Court.*

15 & 16 Vic. c. 54, s. 10, enacts, "It shall be lawful for the party to the suit or other proceedings, or for an attorney of one of her Majesty's superior

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were regularly issued, and were in force at the time of the arrest, and were not superseded by the payment of the debt and the notice to the registrar. *Davis v. Fletcher*, 2 E. & B. 271; 22 L. J. Q. B. 429.

[1] 9 & 10 Vic. c. 95, s. 114, enacts, "that if any officer or bailiff of any court holden under this act shall be assaulted while in the execution of his duty, or if any rescue shall be made, or attempted to be made, of any goods levied under process of the court, the person so offending shall be liable to a fine not exceeding five pounds, to be recovered by order of the court, or before a justice of the peace as hereinafter provided; and it shall be lawful for the bailiff of the court or any peace officer in any such case to take the offender into custody, with or without warrant, and bring him before such court of justice accordingly."

[2] By the 9 & 10 Vic. c. 95, s. 113, "if any person shall wilfully insult the judge or any juror, or any bailiff, clerk, or officer of the said court for the time being, during his sitting or attendance in court, or in going to or returning from the court, or shall wilfully interrupt the proceedings of the court, or otherwise misbehave in court, it shall be lawful for any bailiff or officer of the court, with or without the assistance of any other person, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge shall be empowered, if he shall think fit, by a warrant under his hand, and sealed with the seal of the court, to commit any such offender to any prison to which he has power to commit offenders under this act for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding five pounds, for every such offence, and in default of payment thereof to commit the offender to any such prison as aforesaid for any time not exceeding seven days, unless the said fine be sooner paid."

"The 113th sect. of the statute," said *Wilde, C. J.*, "gives the power to commit for any insult offered to the judge or his officers, or for any wilful interruption of the proceedings of the court, or any other misbehaviour in court, and as many acts may come within that provision which it would be impossible adequately to describe in words, it seems to us that the judge had jurisdiction to decide conclusively whether any particular act did amount to an insult, or interruption, or misbehaviour. It was, therefore, unnecessary to say any more in the warrant than that he had been wilfully insulted." *Levy v. Moylan*, 10 C. B. 189.

It is not necessary that it should specify the particulars of the misconduct. 19 L. J. C. P. 308. See *Lindsay v. Leigh*, 17 id. M. C. 50.

As to the prisons to which persons may be committed for contempt, *see* 12 & 13 Vic. c. 101, s. 2.

courts of record, being an attorney acting generally in the action for such party, but not an attorney retained as an advocate by such first-mentioned attorney, or for a barrister retained by or on behalf of the party on either side, but without any right of exclusion or pre-audience, or by leave of the judge, for any other person allowed by the judge to appear instead of the party, to address the court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the court."

(G) *Of the Court Fees.*[1]

(*a*) *Table of Fees.*[2]

[1] "The fees shall, except in interpleaders, or where such fees shall be payable in respect of keeping possession, appraising or selling goods seized, be paid in the first instance by the party on whose behalf any such proceeding is to be taken, before such proceeding is taken; and in default of the payment of any fees, payment thereof shall, by order of the judge, be enforced by such means as might be employed to recover any debt adjudged by the court to be paid; and a table of all fees shall be posted in some conspicuous place in every court-house and in every registrar's office." 19 & 20 Vic. c. 108. s. 78.

[2] The following Table of Fees is that prescribed by 19 & 20 Vic. c. 108, schedule C.:

For every plaint,—tenpence in the pound.

No fee shall be payable on any application for a new trial, or to set aside proceedings, or in the nature of a *scire facias*, or for a summons in an interpleader.

For every judgment by consent under the 13 & 14 Vic. c. 61, ss. 8 or 9, and for every judgment by default,—one shilling in the pound.

For every hearing,—two shillings in the pound.

An additional hearing fee shall be taken for every new trial.

The hearing on interpleader shall not be prepaid, but shall be estimated on the amount of the money or the value of the goods claimed, which value, in case of dispute, shall be assessed by the judge, who at the hearing shall direct by whom and when and how such fee shall be paid.

No fee shall be payable for hearing any application for a new trial, or to set aside proceedings, or in the nature of a *scire facias*.

For every jury,—five shillings shall be paid to the registrar by the party demanding the jury, on such demand, for the use of the jurors.

For every summons for commitment under the 9 & 10 Vic. c. 95, s. 98,—threepence in the pound on the amount of the original demand then remaining due.

For every hearing of the matters mentioned in such summons for commitment,—sixpence in the pound on the amount last aforesaid.

For issuing every warrant against the body or goods,—eighteenpence in the pound on the amount for which such warrant shall issue.

For issuing every warrant to deliver possession of tenements,—eighteenpence in the pound.

For taking the acknowledgment of a married woman,—one pound.

High-Bailiff's Fees.

For keeping possession of goods till sale, per day (including expenses of removal, storeage of goods, and all other expenses,) not exceeding five days,—sixpence in the pound on the value of the goods seized, to be fixed by appraisement in case of dispute.

Brokers' and Appraisers' Fees.

For the appraisement of goods, whether by one broker or more,—sixpence in the pound on the value of the goods appraised, over and above the stamp-duty.

For the sale of goods, including advertisements, catalogues, sale and commission, and delivery of goods,—one shilling in the pound on the net produce of sale.

In all plaints for the recovery of debt or damages, all poundage, except where otherwise specified in this schedule, shall be estimated on the amount of the claim.

In replevins all poundage, except as aforesaid, shall be estimated on the amount of the alleged rent or damage to be fixed by the registrar.

In plaints for the recovery of tenements when the term has expired or been determined by notice, all poundage, except as aforesaid, shall be estimated on the amount of the weekly, monthly, or yearly rent of the tenement, as such tenement shall have been let by the week or by the month, or for any longer period; and if no rent shall have been reserved, then on the amount of the half-yearly value of the tenement, to be fixed by the registrar.

If in any plaint for the recovery of tenements a claim be made for rent or mesne profits, an additional poundage shall be paid on the amount of such claim.

In plaints for the recovery of tenements for non-payment of rent, all poundage, except as aforesaid, shall be estimated on the amount of the half-yearly rent of the tenement.

In every case where the poundage would but for this rule be estimated on an amount exceeding twenty pounds, it shall be estimated at twenty pounds only.

In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on twenty pounds.

All fractions of a pound, for the purpose of

II. Jurisdiction of the Court.[1]

(A) *The Court has Jurisdiction to determine Plaints where the Debt or Damages do not exceed 50l.*

(*a*) *But not over Actions of Ejectment, except for the Recovery of Small Tenements under* 19 *&* 20 *Vic. c.* 108, *s.* 50.

(*b*) *Nor where Title to any Corporeal or Incorporeal Hereditament, or to any Toll, Fair, Market, or Franchise, is in question.*

(*c*) *Nor where a Will is disputed.*

(*d*) *And it has no Jurisdiction in Malicious Prosecutions.*

(*e*) *Libel or Slander.*

(*f*) *Seduction.*

(*g*) *Or Breach of Promise of Marriage.*

Court has jurisdiction to determine

9 & 10 Vic. c. 95, s. 75, enacts, that "all pleas of personal actions, where the debt or damage claimed is not more than fifty pounds,[2] whether on balance

calculating poundage, shall be treated as an entire pound.

Where the plaintiff recovers less than the amount of his claim, so as to reduce the scale of costs, he shall pay the difference, unless the reduction shall be caused by a set-off.

In cases of interpleader the judge may allow at the hearing the actual costs incurred by the high-bailiff in keeping possession of the goods claimed, and no more.

No increase of fees shall be made by reason of there being more than one plaintiff or defendant.

[1] Under this head is treated only the general jurisdiction, regulated by the nature of the cause, the amount in dispute, and the local limits of the district. The special jurisdiction in particular matters, such as bankruptcy and insolvency, in settling disputes between members of friendly societies, under the Succession Duty Act, Charitable Trusts Acts, Nuisances Removal Act, Metropolitan Building Acts, &c. will be found treated each under its particular head.

"Nothing in this act contained shall be construed to alter or affect the rights or privileges of the chancellor, masters, and scholars of the universities of Oxford or Cambridge respectively as by law possessed, or the jurisdiction of the courts of the chancellors or vice-chancellors of the said universities, as holden under the respective charters of the said universities, or otherwise." 9 & 10 Vic. c. 95, s. 140.

"Nothing in this act contained shall be construed to affect the courts of the lord warden or of the vice-warden of the stannaries of Cornwall; but this provision shall not be deemed to prevent the establishment of any court under this act within the said stannaries, or to limit or affect the jurisdiction of any court so established under this act." 9 & 10 Vic. c. 95, s. 141.

The jurisdiction of courts of local jurisdiction may be excluded, in causes of which the county court has cognisance, by an order in council on the petition of a majority of the ratepayers. 15 & 16 Vic. c. 54, s. 7.

9 & 10 Vic. c. 95, s. 67, enacts, "that no privilege, except as hereinafter excepted, shall be allowed to any person to exempt him from the jurisdiction of any court holden under this act."

Attornies have no privilege not to be sued in the county courts. 12 & 13 Vic. c. 101, s. 18.

If an act of parliament creates new rights between parties, and provides a particular jurisdiction for deciding upon such rights, resort must be had to the remedy thus provided, and no other tribunal can entertain jurisdiction. On this ground the county court cannot entertain a dispute between the members of a friendly society, which, by virtue of the 10 Geo. 4, c. 56, s. 27, must be referred to two justices of the peace. *Payne v. Garratt*, 1 E. & B. 22. *Grinham v. Card*, 7 Ex. 833; 21 L. J. Ex. 322.

But where an act of parliament, passed before the County Courts Act, provided that a certain rate should be recoverable by suit in any of her Majesty's superior courts at Westminster, it was held that up to 50*l.* the county court had jurisdiction. *Stewart v. Jones*, 1 E. & B. 22. *Semb.* they are inferior courts, though courts of record. 19 L. J. C. P. 310: *per Wilde, C. J.*

[2] The amount mentioned is twenty pounds, but by the 13 & 14 Vic. c. 61, s. 1, after reciting that by the 9 & 10 Vic. c. 95, jurisdiction is given to the county courts for the recovery of certain debts, damages, and demands therein mentioned, not exceeding twenty pounds, enacts, that the jurisdiction of the said courts shall extend to the recovery of any debt, damage, or demand, not exceeding fifty pounds.

The court has jurisdiction over an action of detinue, provided the value of the goods does not exceed fifty pounds. *Taylor v. Addyman*, 13 C. B. 209; 22 L. J. C. P. 94: but see *Wickham v. Lee*, 12 Q. B. 52.

In an action for the recovery of small tenements under 19 & 20 Vic. c. 108, s. 50,

plaints where the debt or damages claimed does not exceed 50*l.* with the exception of certain specified actions.

of account or otherwise,[1] may be holden in the county court without writ; and all such actions brought in the said court shall be heard and determined in a summary way, in a court constituted under this act, and according to the provisions of this act: Provided always, that the court shall not have cognisance of any action of ejectment,[2] or in which the title[3] to any corporeal or incorporeal

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the jurisdiction of the court is ousted if it appear that the title to the premises comes in question. *Kerkin v. Kerkin*, 3 E. & B. 399.

[1] "Looking at the whole act," said *Wilde, C. J.*, "I think those words were meant to apply to cases where the parties had themselves balanced the account, or where there had been payments on account." *Woodhams v. Newman*, 7 C. B. 654. "Suppose a claim to be preferred in the county court for a sum below 50*l.* and it appears that the debt originally exceeded 50*l.*, but it has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say that it is without the jurisdiction of the county court, because the debt originally exceeded 50*l.*:" *per Maule, J.*, *Woodhams v. Newman, supra.* "The term 'balance of account,' means after payment of part or after the allowance of set-off as an item in account with the agreement of the parties, which is equivalent to payment of part:" *per Pollock C. B.*, *Avards v. Rhodes*, 8 Ex. 312; 22 L. J. Ex. 106. See also *Turner v. Berry*, 20 L. J. Ex. 819; 5 Ex. 818. It is necessary in order to reduce the debt, so as to bring the amount within the jurisdiction of the county court, that the set-off relied upon for this purpose should be allowed for in the mutual settlement of accounts between the parties, or in some other way have been mutually allowed, or assented to by the defendant, for if the items of set-off are controverted it will constitute a cross-demand, and cannot be taken or allowed in reductions of the sum claimed independently of it. See *Woodhams v. Newman*, 7 C. B. 654; 18 L. J. C. P. 213. Accordingly, where a plaint was entered for "20*l.*, on balance of account," and the particulars disclosed a claim for 227*l.*, against which credit was given to the defendant for payment of 70*l.*, set-off 116*l.* 16*s.* 9*d.*, leaving as balance due to the plaintiff the sum of 40*l.* 3*s.* 3*d.*, and he abandoned the sum of 20*l.* 3*s.* 3*d.*, part of the balance, leaving the sum of 20*l.*; the Court of Exchequer granted a prohibition, on the ground that the plaintiff could not give the county court jurisdiction by reducing his debt by a set-off not assented to by the defendant. *Beswick v. Capper*, 7 C. B. 669; 18 L. J. C. P. 216. And in *Avard & Wife v. Rhodes* (8 Ex. 312; 22 L. J. Ex. 106) the plaintiff in the county court, by his particulars of demand, claimed a sum of 57*l.* 4*s.* for salary, and allowed two items, one of 15*l.* for payments made by the defendant on his behalf, and the other of 4*l.*, cash received of defendant, leaving a balance of 38*l.* 3*s.* 8*d.*; the court held that the county court had no jurisdiction. "The plaintiffs," said *Pollock, C. B.*, "claimed more than 50*l.* Their demand was for 57*l.* 4*s.* subject to a reduction for payment of 4*l.*, which diminished it to 53*l.* 4*s.*, and against which they proposed to allow what on the face of the particulars was no doubt a mere set-off of 15*l.* 4*s.* But this set-off had never been allowed by the defendant before action, so as to constitute part payment, nor did the defendant offer to admit it at the trial; at least, nothing of that sort is stated in the case: consequently it was really a demand for 53*l.* 4*s.*, and a demand on the face of the summons, which the plaintiffs would have to prove, and this is a demand which the county court has no jurisdiction to try." But see *Kimpton v. Willey*, 19 L. J. C. P. 269.

[2] But *see* now 19 & 20 Vic. c. 108, s. 50, providing for the recovery of the possession of small tenements, in certain cases, in the county courts.

[3] To oust the county court of jurisdiction, the question of title raised must be material to the decision of the case. *Morton v. Grand Junction Canal Co.* 6 W. R. 543.

As soon as it appears, either by the pleadings (*Tinniswood v. Pattison*, 3 C. B. 343), or by the evidence (*Lilley v. Harvey*, 5 D. & L. 648; 17 L. J. Q. B. 357), that a question of title to land, or some other matter over which the court has no jurisdiction, is in controversy, the judge ought to stay his hand, and proceed no further; and if he entertain cognisance of it thereafter a prohibition will lie. "It can hardly be intended by the statute," said *Wightman, J.* (*Lilley v. Harvey, supra*), "that the mere assertion of the defendant that he claims title, or that it is in question, will suffice to take away the jurisdiction. The judge must be satisfied that it is in question, and for that purpose must have authority to inquire into so much of the case as is necessary to satisfy him upon that point. Where there are special pleadings, and the question is raised upon them, the judge can go no further; but where the question is not raised upon the pleadings, but is merely suggested by the defendant, the judge must inquire into the circumstances before he can be satisfied that title does come in question. If he is wrong, and assumes jurisdiction when the title really is in question, the defendant, upon making that appear to the superior court, would be entitled to a prohibition. Each case must depend upon its own circumstances." See *Lloyd v. Jones*, 6 C. B. 81; 17 L. J. C. P. 206. *Re Gwynne v. Knight*, 17 L. J. Ex. 168. *Owen v. Pierce*, 1 Cox & Mac. 115. The decision of the county-court judge upon the point, whether a question of title is in controversy, is not conclusive. The judge must, of necessity, determine the point at the time, because on it depends whether he

hereditaments,[1] or to any toll,[2] fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation under any will or

hears it on the merits. The objection as to the want of jurisdiction has been described as analogous to a plea to the jurisdiction in other courts, which is, indeed, determined in the first instance by the court in which it is pleaded, but is subject to a writ of error. The County Courts Act gives no writ of error or appeal of any sort; but then it is presumed that the court deals only with matters within its jurisdiction; and the question must be open to one of the superior courts on motion for a prohibition on affidavit. *Thompson v. Ingham*, 14 Q. B. 710; 19 L. J. Q. B. 189.

A tenant sued for use and occupation of premises by the landlord, of whom he took them on lease, is at liberty to show that the latter's title expired during the tenancy, even although the tenant continued to enjoy or occupy the premises for the whole term, without being subjected to any eviction by the real owner; and if the tenant sets up such a defence when so sued in the county court, that court has no longer any jurisdiction to decide the cause, as title to land has come in question. *Mountney v. Collier*, 22 L. J. Q. B. 124.

Where, at the trial of a suit in the county court, it appears that the title to land is in question, the court has no power to nonsuit the plaintiff, or award to the defendant his costs, the power of the judge to nonsuit being confined to cases in which he has jurisdiction. *Partridge v. Lawford*, 1 H. & N. 621; 26 L. J. Ex. 147.

Although the question of title does arise, the 3d section of 11 & 12 Vic. c. 123, the Nuisances Removal Act, overrides the 58th section of 9 & 10 Vic. c. 95, and in express words gives the county court jurisdiction to determine who is the owner or occupier of the premises, and to make an order upon him for the costs and expenses incurred by the guardians. *Reg. v. Harden*, 2 E. & B. 188; 22 L. J. Q. B. 299. Further, the jurisdiction of the county court in these matters is exclusive, the mode of procedure being expressly enacted by a statute which gives the redress and creates the jurisdiction. *Guardians of Poor of Hertford Union v. Kimpton*, 11 Ex. 295; 25 L. J. M. C. 41.

[1] In *Stephenson v. Raine*, 2 E. & B. 744, 23 L. J. Q. B. 62, the plaintiff sued in the county court as a chapel-clerk of a parochial chapelry against the defendant, as an inhabitant householder of the chapelry, to recover five years' arrears of an annual payment of 4*d.* alleged to be due to him by immemorial custom. Upon the hearing before the county-court judge, the defendant first denied that the plaintiff had ever been duly appointed to the office of chapel-clerk; and, secondly, he denied that any such annual payment was due by custom to the chapel-clerk. He then objected to the jurisdiction of the court. The Court of Queen's Bench granted a prohibition, on the ground that it was an action in which the title to a freehold hereditament came in question. "There seems to be no doubt," said *Lord Campbell, C. J.*, "that this is a freehold hereditament, for it is holden for life. But, according to the legal definitions which have been referred to, as tenements comprehend all lands, so hereditaments comprehend all tenements; and looking to the object and frame of the proviso in question, we are of opinion that the legislature here uses the word in that extensive sense, and meant to exclude the trial of the title to such an office from the jurisdiction of the county-court judge."

In *Lloyd v. Jones*, 6 C. B. 81, 17 L. J. C. P. 206, the term "hereditament" was thus explained by the court:—"Hereditament is defined in the text-books and authorities to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, which, if they were not otherwise bequeathed, would come to him (that is, as next of blood), and not pass to executors and administrators, as chattels do." *See* Termes de Ley, Co. Litt. 6 a; 6 b.

In *Sewell v. Jones*, 19 L. J. Q. B. 372, the plaintiff brought a plaint against the defendant for an injury to his reversion, alleging that the defendant had cut down some trees, and pulled down a fence, separating a garden occupied by a tenant of the plaintiff's from a garden of the defendant's, and had erected a new fence encroaching on the plaintiff's land. The defendant moved for a prohibition before the case came on to be tried in the county court, on the ground of the title to land being in question. The affidavit of the defendant, in answer to the application, stated that the trees cut down were the defendant's own trees, and that the fence had not passed the boundary of his garden: the plaintiff's affidavit supported the charge in the plaint. *Wightman, J.*, made the rule absolute for a prohibition. "It has been contended," said his lordship,

[2] Dues payable to the trustees of a harbour, by vessels passing within certain limits, are tolls within the meaning of the section. *Ady v. The Deputy-Master of Trinity House*, 1 E. & B. 273; 22 L. J. Q. B. 3. But a question as to the right of a railway company to make a charge in respect of the return of certain empty trucks along their line, which depended on the construction of the word "carriages" in their act of parliament, as applicable to the particular case, was held not to be a question as to the title to "tolls" within the act, and that the county court had jurisdiction, the question not being as to the right to tolls on carriages, but whether the particular description of trucks were carriages within the meaning of the section: *Per Coleridge, J., Hunt v. Great Northern Railway Co.* 20 L. J. Q. B. 346.

settlement may be disputed,[1] or for any malicious prosecution,[2] or for any libel or slander, or for criminal conversation, or for seduction, or breach of promise of marriage."

(*h*) *Court has Jurisdiction in Action for Recovery of Balance on a Partnership Account.*

(*i*) *And for a Legacy or a Distributive Share under an Intestacy.*[3]

Court has jurisdiction in action for recovery of balance on

The 9 & 10 Vic. c. 95, s. 65, enacts, that "the jurisdiction of the county court shall extend to the recovery of any demand not exceeding the sum of twenty pounds [now fifty pounds; *see* 13 & 14 Vic. c. 61, s. 1], which is the whole or part of the unliquidated balance of a partnership account, or the

"that the defendant must show the court that he, the defendant, really had a good title, which would come in question, but that seems to me to be making the question of prohibition to depend on the very question on which the case itself would turn. In the cases which have been decided on the point the question has been, whether the defendant *bonâ fide* intended to set up a claim of title."

A paving-rate imposed under the authority of an act of parliament is not an incorporeal hereditament, and may, therefore, be sued for in a county court. *Baddeley v. Denton*, 4 Ex. 504; 19 L. J. Ex. 44. And where the dispute arose between a landlord and his tenant, and related to a right claimed by the tenant to deduct a moiety of a church-rate paid by him, under an act of parliament, which made the rate payable in moieties by the landlord and tenant, the court held that the title to a hereditament did not come in question, and that the county court had jurisdiction. *Gwynne v. Knight*, 1 Ex. 802; 17 L. J. Ex. 168.

Where a plaint was brought in a county court for a trespass in removing the plaintiff's goods from two rooms of a house, which the plaintiff occupied, it appeared that the question in dispute was, whether the plaintiff had let the whole house to the defendant, or had reserved to himself the two rooms in which the alleged trespass was committed. The Court of Exchequer held that this was a question of title to a corporeal hereditament, and that, therefore, the county-court judge had no jurisdiction to hear the plaint. *Chew v. Holroyd*, 22 L. J. Ex. 95; 8 Ex. 249.

The county court has jurisdiction, notwithstanding the question of the existence of an alleged custom arises, provided it does not involve a claim of title to a hereditament. *Lloyd v. Jones*, 6 C. B. 81; 17 L. J. C. P. 206. Thus it was held, that where the defendant in a plaint justified an alleged trespass under a custom for all vessels lying alongside a wharf in the river Thames to overlap with their rigging adjoining wharves, provided they did not in so doing interfere with vessels using the adjoining wharf, it was held that the county court had jurisdiction to entertain the question. *Davis v. Walton*, 2 Ex. 253; 22 L. J. Ex. 25.

But if a question of title to land should arise on a money claim, the jurisdiction of the county court is ousted. As, if it should be set up in answer to a plaint on a promissory note, that it was given in part payment of a sale of real estate, and that the plaintiff had failed to make a good title. *Marsden v. Wardle*, 3 E. & B. 695; 23 L. J. Q. B. 263.

[1] A mere question of construction of the words in a will is not excluded by this proviso. *Gibbon v. Gibbon*, 22 L. J. C. P. 131.

[2] If the court sees that a plaint is in substance for a matter over which the county court has no jurisdiction, it will issue a prohibition. Where, therefore, a plaintiff's costs and expenses, which, if recoverable at all against the defendant, could only be recovered as damages in an action for malicious prosecution, it will be a proper case for a prohibition. *Hunt v. the North Staffordshire Railway Co.* 5 W. R. 731; 29 L. T. Ex. 215.

And where the summons was as follows: "For that your wife assaulted the wife of the plaintiff, and maliciously caused the plaintiff's wife to be wrongfully charged with stealing, and to be detained in custody, whereby the plaintiff was put to expenses in producing witnesses and other persons in clearing the plaintiff's wife from the malicious assault and charge;" the Court of Queen's Bench granted a prohibition. *Jones v. Currey and Wife*, 20 L. J. Q. B. 438. But where the particulars stated that "the defendant did assault and imprison, and did detain in custody the wife of the plaintiff, without reasonable or probable cause;" and the plaint being tried in the county court, it appeared that the plaintiff had ordered a policeman to take the defendant into custody on a charge of felony; the Court of Queen's Bench made absolute a rule to rescind the order for a prohibition, because the plaint was for a trespass by false imprisonment — a matter within the jurisdiction of the county court, and the evidence showed that such was really the subject-matter of complaint, and not a malicious prosecution, though there may have been other circumstances in the case which properly might have been the subject of an action for malicious prosecution. *Chivers v. Savage*, 25 L. J. Q. B. 85.

[3] See *per Lord Campbell*, 2 E. & B. 573; S. C. 22 L. J. Q. B. 415; *sed vide* 8 Ex. R. 208.

amount or part of the amount of a distributive share under an intestacy, or of any legacy under a will."[1] partnership account.

(1) *A Balance not exceeding 50l. after an admitted Set-off, may be recovered in the County Courts.*

By 19 & 20 Vic. c. 108, s. 24, "where in any action the debt or demand claimed consists of a balance not exceeding fifty pounds, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action." *See ante*, p. 369. Where claim reduced by set-off to 50*l.* court to have jurisdiction.

(2) *A Plaintiff cannot Split his Demand for the purpose of Suing in the County Court.*

The 9 & 10 Vic. c. 95, s. 63, enacts, "that it shall not be lawful for any plaintiff to divide any cause of action[2] for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than twenty pounds [now fifty pounds; *see* 13 & 14 Vic. c. 61, s. 1], for which a plaint might be entered under this act if not for more than twenty pounds, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding fifty pounds; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." A plaintiff cannot split his demand for the purpose of suing in the county court.

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[1] A *certiorari* cannot issue to remove a plaint for a legacy into the superior courts, for these tribunals have no jurisdiction to enforce payment of a legacy claimed as such. See *Longbottom v. Longbottom*, 8 Ex. 203; 22 L. J. Ex. 74.

The county court has jurisdiction, notwithstanding a question of *devastavit* should arise, necessitating an inquiry into the accounts of the executor. *Winch v. Winch*, 13 C. B. 128; 22 L. J. C. P. 104.

If the effect of the direction in the will is to create a trust, and not merely payment of a legacy, the county court will not have jurisdiction. *Phillip v. Hewston*, 25 L. J. Ex. 133. *Fuller v. Mackay*, 2 E. & B. 573; 22 L. J. Q. B. 416. Accordingly, where a testator by his will gave to H. 100*l.* in trust, to pay the same to P. on his attaining twenty-one years, and in the meantime to invest the money, and pay the interest to P.; and he empowered H., if he should think fit, to dispose of the whole or part of the money for the advantage of P. during his minority. At the time of the testator's death P. was an infant. Upon his attaining the age of twenty-one years he brought an action in the county court against H. for the recovery of the residue of the 100*l.* The Court of Exchequer made the rule absolute for a prohibition, on the ground that the 100*l.* was not given as a legacy by the will, but that a trust was thereby created, and that the county court had no jurisdiction. *Phillip v. Hewston*, *supra*. But where the residue of a testator's estate was directed to be paid to A., a plaint for such residue was held to be cognisable by the county court, since it was substantially a legacy. *Pears v. Wilson*, 6 Ex. 833; 20 L. J. Ex. 381.

The Court of Chancery has restrained a plaintiff from proceeding in a plaint for a legacy after decree in an administration suit. *Ratcliffe v. Winch*, 22 L. J. Ch. 915.

[2] "This term, 'to divide any cause of action,'" said *Pollock, C. B.* (*Grimbley v. Ayckroyd*, 1 Ex. 470; 17 L. J. Ex. 157), "does not necessarily mean a cause of action on one single entire contract, because there may be one cause of action on several debts contracted at different times, and in far the greater number of cases a count for *indebitatus, assumpsit*, or debt, is founded on many distinct contracts, as was pointed out in the case of *Hesketh v. Fawcett*, 11 Mee. & W. 360; and one count may be considered as one cause of action. To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage . . . We think we may safely conclude that the term 'cause of action' ought to be interpreted one cause of action, and not be limited to an action on a separate contract. But on the other hand, if the term is to comprise all debts that might be included in one account — debts for work and labour, goods sold, use and occupation, &c. — though totally unconnected with each other, which might be included in one *indebitatus* count, would be prevented from being divided under this clause; and if indivisible, and the creditor brought an action for any part, he would virtually abandon all the remainder by the operation of the latter part of the 63d sect. In such a case, *Mr. Justice Coleridge* held that a similar clause in the Brighton Court of Requests Act (3 & 4 Vic. c. 10, s. 24) did not apply, the demand there being for three distinct things — for a horse sold, for rent, and for goods sold; but he made a distinction between that case and one where a debtor has a bill running from day to

(B) *With Consent in Writing of the Parties, the County Court may try any cause.*

With consent in writing of the parties the county court may try any cause.

19 & 20 Vic. c. 108, s. 23, enacts, "the county courts shall not have jurisdiction to try any action for criminal conversation; but with respect to all other actions which may be brought in any superior court of common law, if both parties shall agree by a memorandum signed by them, or their respective attorneys, that any county court named in such memorandum shall have power to try, such county court shall have jurisdiction to try the same."

(*a*) *And notwithstanding Title should come in question, if the Parties consent in Writing at the Hearing, the Court has Jurisdiction.*

Even if title shall come in question, court, with consent of

19 & 20 Vic. c. 108, s. 25. "In any action in the county court in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce, if

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day. (*Neale v. Ellis*, 1 D. & L. 163.) In such a case, though each item of goods supplied, or work done, constitutes a separate contract, so that after the stipulated price becomes due the tradesman were to bring separate actions for each as a distinct debt, any superior court would deal with such a proceeding as vexatious . . . . We think that the 63d clause does apply (whether to all debts which could be comprised in one description in one count we need not now decide), but at all events to the cases of tradesmen's bills, in which one item is connected with another in this sense: that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand."

If the claims are distinct, so that in case of a suit in the superior courts they could not both be comprehended within one count, the plaintiff may bring a distinct plaint in respect of each in the county court, notwithstanding the joint amount exceeds the sum within which the county court has jurisdiction, provided each singly is within such amount. Thus, where there was a plaint for rent, and a distinct plaint for the recovery of double value for holding over after the expiration of the term, it was held that there was no splitting of the claim, each being distinct, and that the county court had jurisdiction, although taken together they were over the amount to which jurisdiction without consent attaches. *Wickham v. Lee*, 12 Q. B. 521; 18 L. J. Q. B. 21. So it has been held that a claim in respect of liquors supplied, and another for money lent, were distinct, notwithstanding an account had been delivered comprising both, and that the plaintiff was justified in bringing separate plaints in respect of each. *Brunskill v. Powell*, 19 L. J. Ex. 362. And so where one claim was in respect of work and labour, and another for money lent. *Kimpton v. Willey*, 19 L. J. C. P. 269. And where a plaint was brought for an assault, and another for the amount of a surgeon's bill, the defendant applying for a prohibition on the ground that the surgeon's bill was incurred in attendance for the injuries inflicted by the assault, the court refused a prohibition because it might be that the defendant had undertaken to pay the surgeon's bill. *Hartley v. Ayurst*, 1 Cox & Max. 109.

If the plaintiff means to abandon the excess, so as give the county court jurisdiction in a case where the debt exceeds 50*l.*, he must do some act of abandonment in the court beyond merely bringing his plaint for the smaller amount. *Vines v. Arnold*, 8 C. B. 632; 19 L. J. C. B. 98. See *Brunskill v. Powell*, 19 L. J. Ex. 362. It seems that a memorandum of such abandonment ought to be entered on the proceedings of the court; but it does not clearly appear from the wording of the 63d section, nor has it been decided, when such abandonment must take place. The most reasonable course undoubtedly is, that the abandonment should be on the face of the summons, or the particulars annexed, so that the defendant may at once accede to the claim if he is so minded, instead of being at the trouble and expense of attending the county court in order to compel the plaintiff to abandon the excess above 50*l.* at the hearing. *Per Parke, B.: Isaacs v. Wylde*, 7 Ex. 163; 21 L. J. Ex. 46. Where at the time of the hearing there was a formal abandonment of the excess of the entire demand above 50*l.*, and an entry or minute was made on the face of the proceedings, the court held that the county-court judge had jurisdiction, after such abandonment, to give judgment and issue execution for 50*l.* *Isaacs v. Wylde*, *supra*. It is essential, however, that, when made at the hearing, the abandonment should be the act either of the plaintiff himself, or of some person duly authorised by him to act on his behalf, and not the act of the county-court judge of his own authority, and without the consent of the plaintiff. *Hill v. Swift*, 10 Ex. 726; 24 L. J. Ex. 137.

both parties at the hearing shall consent in any writing, signed by them or their attorneys, to the judge having such power; but the judgment of the court shall not be evidence of title between the parties or their privies in any other action in that court, or in any proceeding in any other court; and such consent shall not prejudice or affect any right of appeal of either of the parties to such first-mentioned action." parties at trial, may decide the claim.

(C) *What particular County Court has Jurisdiction in Individual Cases.*

(*a*) *The County Court within the District of which the Defendant dwells, or carries on his Business.*[1]

(*b*) *Or in which the Cause of Action arose.*[2]

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[1] A railway company does not carry on its business, within the meaning of the section, at every station on the line, but only at its principal office. In *Shiels v. the Great Northern Railway Co.* 30 L. J. Q. B. 331, a rule was obtained calling on the judge of the county court of Lincoln to hear and try a plaint which he had declined to hear on the ground that he had not jurisdiction; the cause of action having arisen at Newark, in a different county and district from that of the county court. It appeared that the Great Northern Railway Company have a station at Lincoln, within the district of the Lincoln County Court, at which they book passengers; their principal office is in London, where the directors meet, and all their business is transacted for the regulation and guidance of the undertaking in the various places through which the railway passes. *Hill, J.*, discharged the rule, holding that a railway company does not carry on its business at any place other than its principal office at which its business is engaged. "It is true," said the learned judge, "that in a certain sense a railway company carries on its business at every station in the kingdom where it makes contracts for the conveyance of, and receives passengers or goods to be conveyed; and if the words used in s. 60 are to be taken in their most extended import, then a railway company against whom a cause of action within the jurisdiction of the County Courts Act arose, might be sued in any county court in the kingdom, at the option of the plaintiff, provided the company had a station within the district of such county court, without any regard to the place where the cause of action arose, or to the fact that the officers and servants of the company at such last-mentioned station knew nothing, and had nothing to say to the affairs or business of the company, other than obeying the instructions of the directors, and acting in conformity with the regulations of the company, at the particular station where they are employed. Such a manifest inconvenience and injustice could not have been intended by the legislature; and if the words used are capable of a construction which will give full effect thereto, without occasioning such inconvenience and working such injustice, I think a court of law is bound so to interpret the enactment." See *Adams v. the Great Western Railway Co.* 30 L. J. Ex. 124.

A builder whose place of business is in one county-court district, who takes a contract for the erection of extensive buildings in another district, the completion of which will require a considerable time, and for the purpose of such building he erects shops thereat. In one sense the builder carries on business in the last-mentioned district, but he does not do so within the meaning of the enactment. *Gorslett v. Harris*, 29 L. T. 75.

So, a wholesale dealer whose place of business is in London, and who sells exclusively therein, but also employs travellers, who visit different parts of the country at stated periods, making contracts and selling goods for their principal at the various towns and places which they regularly visit, and also collecting money thereat. In an important sense, the wholesale dealer carries on his business at every place where his agents sell his goods. It is clear that London is the only place in which he carries on his business within the meaning of s. 60 of the County Courts Act. *Per Hill, J.: Shiels v. the Great Northern Rail. Co.* 30 L. J. Q. B. 333.

[2] Where the jurisdiction of the county court is dependent on the cause of action having arisen within the district, it is necessary that the *whole* cause of action should have so arisen. *Borthwick v. Walton*, 15 C. B. 501; 24 L. J. C. P. 83. *Kemp v. Clark*, 12 Q. B. 647; 17 L. J. Q. B. 305. Where, however, the question of the locality of the cause of action arises on an application for the costs of suit in the superior court, in a case where the parties resided within twenty miles of each other, it is sufficient ground for refusing the plaintiff his costs that the cause of action arose, *in a material point*, within the jurisdiction of the court within the district of which the defendant resided at the time the action was commenced. 9 & 10 Vic. c. 95, s. 128. Want of attention to this distinction has frequently led to some confusion, the cases upon these distinct points being sometimes applied indiscriminately. For the latter class of cases *see post*.

But it appears that in an action by a car-

Summons may issue in the court in which the defendant, or one of the defendants, dwells at the time, or has dwelt within six months of bringing the action, or where the cause of action arose.

9 & 10 Vic. c. 95, s. 60, enacts, "that such summons may issue in any district in which the defendant, or one of the defendants, shall dwell or carry on his business at the time of the action brought, or by leave of the court for the district in which the defendant, or one of the defendants, shall have dwelt or carried on his business at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned courts."

(D) *Of the Concurrent Jurisdiction*[1] *of the Superior Courts.*

(*a*) *Where the Plaintiff dwells more than Twenty Miles from the Defendant.*[2]

rier for freight or hire, the cause of action may be considered to arise at the place where the goods are delivered to the consignee, where he is sued. *Kemp v. Clark*, 12 Q. B. 647; 17 L. J. Q. B. 305.

Where the suit was brought in the Liverpool County Court, in respect of a contract whereby it was agreed that a cargo on board a ship at Queenstown should be sold and delivered in any part of the kingdom which the plaintiff might direct, and on handing over the shipping documents and policy of insurance the price was to be paid. The contract was made at Liverpool, and a demand was also made there upon the defendant to hand over the shipping documents and policy of insurance. The action was brought on that contract. In the particulars of demand, the plaintiff said th t he sued the defendant for damages sustained by the defendant not delivering the cargo. On an application for a prohibition the Court of Queen's Bench said, that "if the action were only for not delivering the cargo, the cause of action would certainly not arise within the jurisdiction of the county court of Liverpool, because the cargo was to be delivered at Drogheda, in Ireland. But under the particulars, it was possible that the plaintiff might be proceeding for a cause of action arising within the jurisdiction, namely, for not handing over the shipping documents and policy of insurance at Liverpool. And the court granted a prohibition so far as related to that breach of the contract which was not within the jurisdiction of the county court, thus enabling the plaintiff to proceed for that breach of the contract in not delivering over the shipping documents and policy of insurance, leaving the county-court judge, if he thought fit, to allow the particulars to be amended so as to meet this breach of the contract. *Walsh v. Ionides*, 1 E. & B. 383; 22 L. J. Q. B. 137.

In *Buckley v. Hann*, 5 Ex. 43, 19 L. J. Ex. 151, the question arose on a suggestion to deprive the plaintiff of costs, whether the *whole* cause of action arose within the jurisdiction of the London Small Debts Court. The action was on a bill of exchange, by an indorsee against an indorser. The bill was drawn and accepted within the city of London, and the defendant wrote his indorsement upon it within the city, but sent it by his agent to the plaintiff, who lived out of the city. The court held that the whole cause of action did not arise within the city. *See* also *Wood v. Perry*, 3 Ex. 442; 18 L. J. Ex. 161: but see *Roff v. Miller*, 19 L.J.C.P. 278.

Where the action was brought for the recovery of a reward offered for the apprehension and conviction of a felon, "to be paid on his conviction," and the felon was apprehended by the plaintiff within the jurisdiction of the county court of N., and was tried and convicted at H., out of the jurisdiction of the N. county court; the court held that the whole cause of action did not arise within the jurisdiction of the N. county court, for, by the terms of the contract, the conviction was a material part of the cause of action. *Hernaman v. Smith*, 10 Ex. 659; 24 L. J. Ex. 175.

A carrier and wharfinger at Swindon, in Wiltshire, agreed in writing with M., who resided in Surrey, to barge timber from the river wharf to London, at any wharf there, at 16*s.* per ton, to include all charges except wharfage. It was necessary to haul the timber from the place where it lay, to be loaded on board the barges, and at times, when the horses of M. were not on the spot, the carrier provided horses and hauled the timber. A plaint was afterwards brought in the county court for the district of Swindon against M. for 50*l.*, the balance of account claimed by the carrier, including two items amounting to 1*l.* 16*s.* for hauling. The court held that the hauling of the timber and the carriage of it to London constituted but one cause of action, and that as such cause of action did not arise until the delivery of the timber in London, the judge of the county court of Swindon had no jurisdiction to try the plaint under the 9 & 10 Vic. c. 95, s. 60. *Barnes v. Marshall*, 21 L. J. Q. B. 388.

[1] The expression, "concurrent jurisdiction," must not be understood to imply an exclusion of jurisdiction in other cases. The jurisdiction of the superior courts is not impaired by the County Courts Acts, further than their operation to deprive a plaintiff of costs in certain cases within the jurisdiction of the county courts. By cases within the "concurrent jurisdiction," is meant only such as the plaintiff may, at his option, bring in the superior courts, without being deprived of his costs by the County Courts Acts: *i.e.* if successful, he is entitled to an order or certificate for his costs. *See ante.*

[2] The distance is measured, not by the nearest mode of access, but by a straight

(b) Or the Cause of Action did not arise wholly or in some material point within the Jurisdiction of the Court within which the Defendant dwells or carries on his Business at the time of the Action brought.[1]

line on a horizontal plane. *Lake v. Butler*, 5 E. & B. 92. *Stokes v. Grissell*, 14 C. B. 678. If there are several plaintiffs, or several defendants, in either event all of them must dwell within twenty miles of the plaintiff or the defendant, as the case may be, in order to deprive the superior courts of their concurrent jurisdiction. *Hickie v. Salomo*, 8 Ex. 59. *Doyle v. Lawrence*, 2 L. M. & P. 368. *Parry v. Davies*, 19 L. J. Ex. 284.

The plaintiff, for three years prior to bringing the action, hired a house at Margate for his wife, family, and servants, and permanently established them there, he and his family occupying the house as their dwelling and home. At the same time he occupied a house and carried on business in London, within twenty miles of the defendant; and as his business required his presence, he stayed and slept there three or four days in every week. He resided with his family at Margate whenever business would allow him to do so:—*Held*, that he must be considered as dwelling at Margate, and, therefore, that the superior court had concurrent jurisdiction. *Kerr v. Haynes*, 29 L. J. Q. B. 70.

The plaintiff may come to reside within the district for the express purpose of giving the county court jurisdiction. Accordingly, where the plaintiff had taken lodgings within the district only the day previous to that on which the summons was issued, and had continued to reside there down to the day of trial, it was held a sufficient residence to give the county court jurisdiction. *Massey v. Burton*, 2 H. & N. 507; 27 L. J. Ex. 101.

[1] The word "dwelling," is synonymous with "place of abode," or "residence." It is his domicile or home. See *Lamb v. Smyth*, 15 L. J. Ex. 287. Where the permanent residence of the plaintiff was at Inverness, in Scotland, but every year he came to London on business, and at the time at which the action was brought he had lodgings in Golden Square, which he had occupied from March to October; the court held that did not constitute a dwelling within the above section. "Each case," said *Jervis, C. J.*, "must depend upon its particular circumstances; but where a party has a permanent place of dwelling we do not think that he dwells, in the sense of that word as used in the statute, at a place where he has lodgings for a temporary purpose only." *Macdougall v. Paterson*, 11 C. B. 755; 21 L. J. C. P. 27.

It seems that if the plaintiff dwell at two places, one of them less and the other more than twenty miles from the defendant, the superior courts have concurrent jurisdiction. *Macdougall v. Paterson, supra; See* 28 L. J. Q. B. 86. A trading corporation dwells at the principal office where its business is carried on. *Taylor v. Crowland Gas Co.* 11 Ex. 1; 24 L. J. Ex. 233. *Shiels v. Great Northern Railway Co.* 30 L. J. Q. B. 331; 7 Jur. 631.

The business carried on must be that of the defendant himself: and, accordingly, a clerk in the Privy Council Office does not carry on business in the district where his office is. *Sangster v. Cave*, 5 Ex. 386; 19 L. J. Ex. 314. A clerk in the city cannot therefore, by reason of being so, be said to carry on business there within the meaning of the section. *Buckley v. Hann*, 5 Ex. 43; 19 L. J. Ex. 151.

In *Rolfe v. Learmonth*, 14 Q. B. 196, 19 L. J. Q. B. 10, the defendant was a surgeon, apothecary, and accoucheur. He resided at C., in the district of the A. county court. He daily attended to patients in the B. county court, and a great part of this branch of his practice was carried on within that district. *Coleridge, J.*, held, that the defendant carried on his business within the district of the B. county court within the meaning of the section.

But in *Mitchell v. Hender*, 23 L. J. Q. B. 273, the defendant held the office of deputy-sealer in the Court of Chancery, and followed the person of the Lord Chancellor, performing his duties, sometimes at Westminster Hall, sometimes at Lincoln's Inn, and when the Lord Chancellor was not sitting, at the Great Seal Office, Quality Court, Chancery Lane. The court held that he could not be considered to have any fixed place of business within the meaning of the section.

A railway company does not carry on its business at a simple receiving-house. *Mirror v. the London and North-Western Railway Co.* 28 L. T. 144. *Shiels v. Great Northern Railway Co. supra.*

A mere trading within the district is not enough, or the conduct of business through an agent; there must be personal attendance. *Sheils v. Rate*, 7 C. B. 116. *Robinson v. Searson*, 6 Man. & G. 762; 13 L. J. C. P. 7. "The case of a dormant partner," said *Parke, B.* (*Whiley v. Stiff*, 7 C. C. Chron. 58) "in a firm that carried on business, or a business that was entirely carried on by an agent, would not, I think, be a carrying on business within the meaning of the act, enabling the dormant partner in the one case, or the principal in the other, to be sued in the district court where the business was being carried on."

The entering into an agreement for the sale of goods within the jurisdiction of the county court is a sufficient material part of the cause of action to give such court cognisance of it, although the goods should be delivered without the jurisdiction. *Norman v. Marchant*, 7 Ex. 723; 20 L. J. Ex. 256. But where the meritorious consideration is

(c) *Or where any Officer of the County Court is a Party, except in respect of a Claim to Goods taken in Execution of Process of the Court.*[1]

9 & 10 Vic. c. 95, s. 128, enacts, "that all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the

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performed out of the local jurisdiction, the mere fact of a portion of it having been performed within does not give the county court exclusive jurisdiction. *Barnes v. Marshall*, 18 Q. B. 785; 21 L. J. Q. B. 388.

Where the action is on a tradesman's bill consisting of various items, delivered at different times, although an action might be brought at the time on the delivery of each article, yet when a bill has been delivered for the whole, the items become one cause of action, and the party delivering it is bound to sue in one action. If in such a case any of the items have been delivered within the jurisdiction of the county in which the defendant dwells or carries on his business, although other of the articles may have been delivered out of the jurisdiction, yet the delivery of some of them within forms a material part of the cause of action, and the plaintiff ought to sue in the county court. *Bonsey v. Wordsworth*, 18 C. B. 325; 25 L. J. C. P. 205. *Wood v. Perry*, 3 Ex. 442; 6 D. & L. 194. The expression, "cause of action," does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts contracted at different times. The 63d section, therefore, does not apply to cases of tradesmen's bills, in which one item is connected with another in this sense that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another, and form one entire demand. *Per Cur.: Grimbley v. Aykroyd*, 1 Ex. 479.

Although bills of exchange and promissory notes have by the common law no locality, claims in respect of them are causes of action, which may make it imperative on the holder to proceed in the county court. *Butler v. Corney*, 2 Ex. 474. *Lowley v. Rossi*, 12 Q. B. 592. *Nind v. Rhodes*, 5 D. & L. 621. If the bill be accepted within the jurisdiction of the county court within which the acceptor dwells at the time the action is commenced, it is a sufficient material part of the cause of action to make it necessary for the *drawer* to sue in the county court. *Reff v. Miller*, 19 L. J. C. P. 298. So the court within the district of which the drawer receives notice of dishonour has jurisdiction in an action by the indorsee who gave such notice. *Huth v. Long*, 19 L J. Q. B. 325. But a mere indorsement unaccompanied by delivery is insufficient to give the county court jurisdiction in an action by the indorsee against the indorser (*Buckley v. Hann*, 6 Ex. 43); so likewise is the mere receiving by the drawer within the jurisdiction of a bill accepted beyond the jurisdiction. *Wilde v. Sheridan*, 21 L. J. Q. B. 260.

Where the defendant residing out of the jurisdiction wrote and sent a letter giving an order to the plaintiff, which letter was received and executed by the plaintiff entirely within the jurisdiction of the county court of L., by leave of the registrar process was issued out of that court and served upon the defendant out of the jurisdiction; it was held, that as the letter was no request until it reached its destination, the cause of action arose within the jurisdiction of the county court of L., and that the process was rightly issued. *Newcomb v. De Ros*, 29 L. J. Q. B. 4; 24 Jur. 68. *Aris v. Orchard*, 6 H. & N. 160; 30 L. J. Ex. 21.

The plaintiff at G., within the jurisdiction of the G. county court, received from the defendant at L. an order for plants, the description of which was taken from a price-list of the plaintiff, in which also the plaintiff undertook to pay the carriage of goods ordered from him. The defendant ordered the plants by letter, and requested they should be sent by a particular carrier. The defendant resided more than twenty miles from the plaintiff, and within the jurisdiction of another county court. The plaintiff having sent the goods to the defendant by carrier, brought an action in the county court of G. to recover a balance alleged to be due in respect of them: — *Held*, that the cause of action did not arise wholly in the jurisdiction of the county court of G., as the delivery there was not a delivery to the defendant, and that the county court therefore had no jurisdiction. *Wheeler v. Pearson*, 5 W. R. Ex. 227; 28 L. T. 255.

[1] A person suing as executor or administrator of an officer is not within the section. *Robieson v. Rees*, 19 L. J. Q. B. 145. If the case is within the exception, and in other respects within the jurisdiction of the county court, the plaintiff is not entitled to his costs. *Mann v. Buckerfield*, 20 id. 265; 2 L. M. & P. 55.

court, or the proceeds or value thereof, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed."

III. Of the Procedure and Practice in Ordinary Suits and Proceedings in the County Courts preliminary to the Hearing.

(A) *Agreement to give County Court Jurisdiction.*[1] *See ante*, p. 354.

(B) *Of the Plaint.*

(*a*) *Suits are by Plaint.*[2]

Suits are by plaint.

9 & 10 Vic. c. 95, s. 59, enacts, "that, on the application of any person desirous to bring a suit under this act, the clerk of the court shall enter in a book, to be kept for this purpose in his office, a plaint in writing, stating the names and the last-known places of abode of the parties, and the substance of the action intended to be brought, every one of which plaints shall be numbered in every year according to the order in which it shall be entered; and thereupon a summons, stating the substance of the action, and bearing the number of the plaint on the margin thereof, shall be issued under the seal of the court according to such form, and be served on the defendant so many days before the day on which the court shall be holden at which the cause is to be tried, as shall be directed by the rules made for regulating the practice of the court, as hereinafter provided; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice, shall be deemed good service; and no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be commonly known."

(*b*) *Particulars of Demand.*[3]

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[1] *Agreement to give Jurisdiction to a County Court under sect. 23 of 19 & 20 Vic. c. 108.*

We [*or* the respective attorneys of], A. B., of &c., and C. D., of &c., do hereby agree that the county court of holden at shall have power to try an action to be brought by A. B. against C. D., for under the provisions of sect. 23 of 19 & 20 Vic. c. 108.

Given under our hands, this day of 186

A. B. [*or* E. F.], attorney for A. B.
C. D. [*or* G. H.], attorney for C. D.

[2] By rule 33, "every plaint shall be entered in the 'plaint book' before issuing the summons."

R. 34. "Where the plaintiff is unacquainted with the defendant's Christian name, the defendant may be described by his surname, or by his surname and the initial of his Christian name, or by such name as he is generally known by, and the defendant may be so described in the summons; and in the event of the plaintiff or defendant not appearing, the proceedings under sects. 79 & 80 of 9 & 10 Vic. c. 95, may be taken as if the true Christian name and surname had been stated in the summons, and all subsequent proceedings thereon may be taken in conformity with such description, but without prejudice to any amendment made at any future time by direction of the judge."

R. 185. "Where the parties in pursuance of sect. 23 of 19 & 20 Vic. c. 108, agree to try any action in a county court, a plaint shall be entered, and a summons shall be issued thereon, as in other cases; and all the rules and practice of the court shall be adopted in such cases, so far as the same are applicable."

[3] By rule 35, "on entering the plaint, the plaintiff shall in all cases where the sum sought to be recovered shall exceed forty shillings, deliver at the office of the registrar as many copies of a statement of the particulars of his demand or cause of action as there are defendants, and an additional copy to be filed; and where the demand exceeds fifty pounds, but the plaintiff desires to abandon the excess, or to admit a set-off, and sues in a county court for the residue, the abandonment or the admission of the set-off shall be entered on the particulars before service; and in all cases the particulars shall be deemed part of the summons."

R. 36. "In actions for penalties to secure the performance of covenants, within the meaning of the 8 & 9 Wm. 3, c. 11, the plaintiff shall deliver particulars of the breaches on which he relies, in the same manner as required by the last rule, which, when delivered, shall be deemed part of the summons; and if the court shall be of opinion that the plaintiff is entitled to recover, judgment shall be entered for the penalty, where the penalty does not exceed the

(*c*) *The Plaint Note.*[1]

(C) *The Summons, and its Service.*

(*a*) *The Summons.*[2]

amount over which the court has jurisdiction; and where the penalty does exceed such amount, then for the amount over which the court has jurisdiction, and an entry shall be entered on the minutes of the damages awarded to the plaintiff, and execution may issue for the amount of such damages; and in case of subsequent breaches, the plaintiff may enter a plaint, and sue out a summons in the nature of a *scire facias* on such judgment, and shall deliver particulars of such subsequent breaches in the manner before-mentioned, and which shall be deemed part of such summons."

R. 37. "If the amount claimed in any case include a fraction of a penny, such fraction shall not be entered in the books of the court, and judgment shall not be given for such fraction.

The particulars will be sufficient if they convey reasonable information of the nature of the plaintiff's case, so expressed as to avoid the danger of the defendant being misled. See *Stancliffe v. Clarke*, 7 Ex. 439; 21 L. J. Ex. 129. In the case of a money demand, the different items, together with the dates, should be specified. Credit should be given for payments on account, and matters of set-off may, if it is deemed expedient, be stated and allowed. See *Mercy v. Galot*, 6 D. & L. 656. *Wedlake v. Sargent*, 11 C. B. 32; 15 Jur. 1134.

Where the county-court judge has allowed the particulars to be amended, the superior court will not review the exercise of his discretion on an appeal. *Cannon v. Johnson*, 21 L. J. Q. B. 164.

[1] By rule 38, "at the time of entering the plaint, the registrar shall give to the plaintiff, or his attorney or agent, a note under the seal of the court, according to the form in the schedule; and no money shall be paid out of court to the plaintiff, or his attorney or agent, unless on production of such note: Provided that, in the event of such note being lost or destroyed, no money shall be paid to any person, unless it be proved on oath, to the satisfaction of the registrar, that the person applying is the plaintiff or his agent, authorised in that behalf."

The following is the form of

Plaint Note on entering Plaint.

In the County Court of holden at

[*Seal*].

No. [*of Plaint*].

Between A. B. plaintiff,
against
C. D. defendant.

Fees paid.		
£	s.	d.

The above cause was entered this day, and will be tried at on the day of at o'clock in the noon.

Dated this day of 185

Register of the Court.

Hours of attendance at the office of the register [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

N. B. If you obtain a judgment against the defendant, all monies ordered to be paid thereunder must be paid into court, and must not be received by you. [*See* sect. 45 of 19 & 20 Vic. c. 108.]

Bring this note when you come to the court or to the office, for any purpose connected with this cause. On the day of hearing bring all books, &c. necessary to prove your case.

Money will be paid out of court only on production of this note, and upon you or your agent's personal attendance, as the book must be signed by you or your agent; and no officer of the court is allowed to sign it as your agent. If the defendant will consent to a judgment, or will sign a statement at the office of the register, confessing that he owes you the money, or if you and he will sign an agreement at the register's office as to the amount due, &c., you will only have to pay half the usual hearing fee. If the debt or claim exceed five pounds, you may have the cause tried by a jury, on giving notice in writing at the register's office three clear days before the hearing, and on payment of five shillings for the use of such jury.

Summonses for witnesses, and for the production of documents, may be obtained at the office upon payment of the proper fee.

[2] The 9 & 10 Vic. c. 95, s. 60, enacts, "that such summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned courts."

Id. sect. 61, enacts, "that any summons or other process which under this act shall be required to be served out of the district of the court from which the same shall have issued, may be served by the bailiff of any court holden under this act, in any part of England, and such service shall be as valid as if the same had been made by the bailiff of the court out of which such summons or other process shall have issued within the jurisdiction of the court for which he acts."

Id. sect. 62, enacts, "that service of any summons or other process of the court, which shall require to be served out of the district of the court, may be proved by affidavit, purporting to be sworn before any

judge of a county court, or before a master extraordinary in Chancery, or any person now authorised by law to take affidavits; and the fee for taking such affidavit shall not be more than one shilling, and shall be costs in the cause; and in every case of the unavoidable absence of the bailiff by whom any summons or other process of the court shall have been served, the service of such summons or other process may be proved, if the judge shall think fit, in the same manner as a summons served out of the district of the court, but without additional charge to either of the parties to the suit."

R. 39. "The summons to appear to a plaint shall be in the form set forth in the schedule, and shall be dated on the day on which the plaint was entered, and the date thereof shall be the commencement of the suit."

R. 40. "Such summons may be returnable either at the next court after the entry of the plaint, or, by leave of the court or registrar, at any subsequent court to be held within three calendar months."

R. 41. "The registrar shall not issue a summons under sect. 15 of 19 & 20 Vic. c. 108, unless he is satisfied, by statement on oath, that the party applying has a cause of action, and that the whole of such cause arose within the home district."

R. 42. "Where a summons is issued by leave of the judge or registrar, the words 'by leave of the court,' or 'by leave of the registrar,' as the case may be, shall be written on the face of the summons."

R. 43. "Where a summons has not been served, successive summonses may be issued without entering a new plaint, unless the non-service has been caused by the fact of the defendant's having removed from the address given before the entry of the plaint, or unless the plaintiff shall have given a wrong or insufficient address; but if the bailiff ascertain that the defendant has removed to some other place within the district of the court, he shall serve the summons at such other place, indorsing on the copy thereof the new address; and the successive summons or summonses shall bear the same date and number as the summons first issued, which date and number shall be written in red ink in the 'Plaint Book,' and such summons shall be a continuance of the first summons, provided that no successive summons shall be issued on a plaint which has been entered more than three months."

In the metropolitan districts the summons may issue out of the court in which either the plaintiff or defendant dwell or carry on business, if both are metropolitan districts. By the 19 & 20 Vic. c. 108, s. 18, it is enacted, that "where a plaintiff shall dwell or carry on business in the district of the Bloomsbury county court of Middlesex, or in the district of the Brompton county court of Middlesex, or in the district of the Clerkenwell county court of Middlesex, or in the district of the Lambeth county court of Surrey, or in the district of the Marylebone county court of Middlesex, or in the district of the Shoreditch county court of Middlesex, or in the district of the Southwark county court of Surrey, or in the district of the Westminster county court of Middlesex, or in the district of the Whitechapel county court of Middlesex, and the defendant shall dwell or carry on business in the district of any of the said courts, the summons may issue and be served either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business."

A judge proposing to sue any person dwelling or carrying on business in any district of which he is judge, may bring his action in the county court of any adjoining district of which he is not judge; and any person proposing to sue a judge may bring his action in any county court of a district adjoining the district of which the defendant is judge. 19 & 20 Vic. c. 108, s. 19.

And if an action be brought by an officer of a county court in the court of which he is officer, except in the case of the registrar suing as official assignee, the judge shall, at the request of the defendant, order that the venue be changed, and that the cause be sent for hearing to the court of some convenient district, of which he is not the judge; and the registrar of the first-mentioned court shall forthwith transmit by post to the registrar of such last-mentioned court a certified copy of the plaint, as entered in the plaint book, the duplicate copy of the summons and particulars served on the defendant, and a certified copy of the order for changing the venue as entered in the minute book; and the judge of such last-mentioned court shall appoint a day for the hearing, notice whereof shall be sent by post or otherwise, by the registrar of such last-mentioned court, to both parties. 19 & 20 Vic. c. 108, s. 20.

If an action be brought against an officer of a county court the summons may issue in the district of which he is an officer, or in any adjoining district, the judge of which is not the judge of a court of which the defendant is an officer. Id. s. 21.

The following is the form of the

Summons to appear to a Plaint.

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*] Between A. B. plaintiff,
[*Address*],
[*Description*],
and
C. D. defendant,
[*Address*],
[*Description*].

* Issued by leave of the court, *or* by leave of the registrar.

---

* Insert this when necessary.

(*b*) *Service of Summons.*[1]

You are hereby summoned to appear at a county court, to be holden at on the day of at the hour of in the noon, to answer the plaintiff to a claim, the particulars of which are hereunto annexed. [*Where the amount of the claim does not exceed forty shillings, after "claim" strike out the words "the particulars of which are hereunto annexed," and state shortly the substance of the claim.*]

Dated this day of

Registrar of the Court.

	£	*s.*	*d.*
Debt or claim			
Costs of plaint			
Attorney's costs * . . .			
Total amount . . £			

To the Defendant.

N. B. If you owe the money and will consent to a judgment, you will save half the hearing fee.

(See back.)

[*To be Indorsed on the Summons.*]

If you confess the plaintiff's claim—by doing which you will save half the hearing fee—you should sign and deliver your confession to the registrar of the court, five clear days before the day of hearing; but you may deliver your confession at any time before the cause is called on, subject to the payment of any further costs which your delay may have caused the plaintiff to incur.

If you and the plaintiff can agree as to the amount due, and the mode of payment, and will, before the cause is called on for trial, sign a memorandum of such agreement at the registrar's office, or before an attorney, you will save half the hearing fee.

If you pay the debt and costs as stated in the summons five clear days before the hearing, you will avoid further costs; but you may pay the same at any time before the cause is called on for trial, subject to the payment of any further costs which your delay may have caused the plaintiff to incur.

If you admit a part only of the claim you may, by paying in the registrar's office the amount so admitted, together with costs proportionate to the amount you pay in, five clear days before the day of hearing, avoid further costs, unless the plaintiff, at the hearing, shall prove a claim against you exceeding the sum so paid.

If you intend to rely on a set-off, infancy, coverture, a statute of limitations, or a discharge under a bankrupt or insolvent act, as a defence, you must give notice of such special defence to the registrar five clear days before the day of hearing, and such notice must contain the particulars required by the rules of the court; and you must deliver to the registrar as many copies of such notice as there are plaintiffs, and an additional copy for the use of the court.

If your defence be a set-off you must, with each notice thereof, deliver to the registrar a statement of particulars thereof. If your defence be a tender, you must pay into court, before or at the hearing, the amount tendered.

If the debt or claims exceed five pounds you may have the cause tried by a jury, on giving notice in writing at the registrar's office three clear days before the hearing, and on payment of five shillings for the use of such jury.

Summonses for witnesses and for the production of documents will be issued upon application at the office of the registrar of the court, upon payment of the proper fee.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*] when the office will be closed at one.

N.B. Where a plaintiff proposes to charge in the summons that the defendant has had assets and has wasted them, commence with the above form of summons, but naming defendant as executor or administrator of the deceased, and adding:—

"And the plaintiff alleges that you, the defendant, have money, goods, and chattels, which were the property of deceased, at the time of his death, and which came to your hands as executor [*or* administrator] of the said deceased to be administered; and if you have not, that you have withholden and wasted the same, whereby you have become liable to satisfy the plaintiff's claim, and his costs herein, out of your own goods."

[1] By rule 44, "a summons to appear to a plaint, where it is to be served in the home district, should, in order to insure its service, be delivered to the bailiff at least twelve clear days, and where it is to be served in a foreign district, fifteen clear days, before the return days thereof: Provided that a summons may be issued at any time before the return day, on production to the plaintiff, by the registrar, of an affidavit, showing that the defendant is about to remove out of the ordinary jurisdiction of the court; and service of such summons at any time before the return day may be deemed good service if, at the hearing, the judge is satisfied on the evidence on oath before him that such party was about to remove out of the ordinary jurisdiction of the court: but in every such case, whether such proof be given or not, the judge may in his discretion, and on such terms as he shall think fit, adjourn the hearing."

R. 45. "The service of the summons, except in the cases hereinafter specially provided for, shall be either personal, or by delivering the same to some person apparently sixteen years old at the house or place of dwelling, or place of business of

* Insert this where the amount claimed exceeds 20*l.* and an attorney has signed the particulars of plaintiff's demand.

the defendant; but no place of business shall be deemed the place of business of the defendant, unless he shall be the master or one of the masters thereof."

R. 46. "Where a defendant is living or serving on board of any ship or vessel, it shall be sufficient service to deliver the summons to the person on board who is, at the time of such service, apparently in charge of such ship or vessel."

R. 47. "Where a defendant is residing or quartered in any barracks, and serving her Majesty as a soldier or marine, it shall be sufficient service to deliver the summons at the barracks to the adjutant of the corps, or to an officer or serjeant of the company or troop to which such soldier or marine belongs."

R. 48. "Where a defendant is a prisoner in a gaol, it shall be sufficient service to deliver the summons at the gaol to the governor or any person appearing to be the head officer in charge thereof."

R. 49. "Where a defendant is working in any mine or other works underground, it shall be sufficient service to deliver the summons at the mine or works to the engine-man, banksman, or other person apparently in charge of the mine or works."

R. 50. "Where the defendant is employed and dwells in any lunatic or other public asylum, or in any common gaol or house of correction, it shall be sufficient service to deliver the summons to the gate-keeper or lodge-keeper of the asylum, gaol, or house of correction."

R. 51. "Service of the summons may be effected on a railway company or other corporation, by delivering the summons to a secretary, station-master, or clerk of the defendant, at any station or office of the defendant within the district of the court in which the summons is to be served."

R. 52. "Where a defendant keeps his house, or place of dwelling, or place of business, closed, in order to prevent a bailiff from serving the summons, it shall be sufficient service to affix such summons on the door of such house, or place of dwelling, or place of business."

R. 53. "Where a bailiff is prevented by the violence or threats of the defendant, or of any other person or persons in concert with him, from personally serving such summons, it shall be sufficient service to leave such summons as near to the defendant as practicable."

R. 54. "Where the summons has not been served personally, or under the provisions of the last four rules, and the defendant does not appear in person or by his attorney or agent at the return day, the cause may proceed if the judge is satisfied, on the evidence on oath before him, that the service of such summons has come to the knowledge of the defendant before the return day, but no such evidence shall be necessary in the cases specially mentioned in the last four rules."

R. 55. "Whenever a summons has been served in one of the modes hereinbefore mentioned, but it appears that it has come to the knowledge of the defendant less than ten clear days before the return day, the cause may, at the discretion of the judge, proceed or be adjourned, whether the defendant appears or not at the hearing."

R. 56. "The twelve rules preceding this rule shall not apply to summonses under sect. 28 of 19 & 20 Vic. c. 108, or under the Summary Procedure on Bills of Exchange Act, 1855."

R. 57. "Where a summons shall issue under sect. 18 of 19 & 20 Vic. c. 108, the same shall be served by the bailiff within which the defendant shall dwell or carry on business, unless the judge shall in such case otherwise specially order: Provided that this rule shall not interfere with the general power now vested in the bailiff of the court from which the summons has issued, to serve the same within five hundred yards of the boundary of his district."

R. 58. "The above rules as to the mode, but not those as to the time, of service of summonses to appear to a plaint, shall apply to the mode of service of all summonses whatsoever, except where otherwise directed by statute or by these rules."

R. 59. "No summons, order, or other process or notice, shall be served on Sunday, Christmas Day, or Good Friday, or on any day appointed by royal proclamation for a public fast, humiliation, or thanksgiving; but such days shall be counted in the computation of the time required by these rules in respect of such service."

"A summons may be served, or a warrant executed, within five hundred yards of the boundary of the district of the county court from which the same issued by the bailiff of such court, or, by order of the judge of such court, by such bailiff within the district of any other court." 19 & 20 Vic. c. 108, s. 17.

Service on the defendant while in the county court attending to his own case, has been held good service of the summons. *Poole v. Gould*, 25 L. J. Ex. 250.

Questions respecting the sufficiency of any particular service are for the decision of the county-court judge; and his decision thereupon will not be reviewed upon application for a prohibition. *Robinson v. Lenaghan*, 2 Ex. 333; 17 L. J. Ex. 174. *Zohrab v. Smith*, 5 D. & L. 635; 17 L. J. Q. B. 174. *Waters v. Handley*, 6 D. & L. 88.

Objection to the service of the summons should be made before any step in the cause is taken. The defendant will waive an irregularity by appearing to the action, giving notice of a special defence, or the like. *Jones v. James*, 19 L. J. Q. B. 257.

Affidavit of Service of Summons out of the District, or where the Bailiff is unavoidably absent.

No.

In the County Court of holden at

[*Seal.*] Between A. B. plaintiff,

and

C. D. defendant.

(*c*) *Summons where Debt exceeds* 20*l.*, *requiring Defendant to give Notice of Intention to Defend.*

If liquidated demand exceed 20*l.* plaintiff may require defendant to give notice of intention to defend, on pain of judgment by default.

19 & 20 Vic. c. 108, sect. 28. "In any action in a county court for a debt or liquidated money demand exceeding twenty pounds, the plaintiff may, at his option, cause to be issued either a summons in the ordinary form, or a summons in the form or to the effect given in schedule (B.) to this act, numbered (1) :[1] provided that if such last-mentioned summons be issued it shall be personally served on the defendant twelve clear days before the return day thereof, and then if the defendant shall not, at least six clear days before such return day, give notice in writing, signed by himself, his attorney or agent, to the registrar, of his intention to defend,[2] the plaintiff may, on or within one month after such return

I, one of the bailiffs of the county court of holden at make oath and say, that I did on the day of 18 duly serve the defendant with a summons, a true copy whereof is hereunto annexed, marked A, at by delivering the same personally to the defendant [*or as the case may be*].

Sworn at in the county court of the day of 18 and before me,

E. F. Bailiff.

Indorse the Summons or other process thus:

This paper, marked "A," is the paper referred to in the annexed affidavit.

The following is the form of a

Letter to be sent with Summons out of District.

No. [*of Plaint*].

In the County Court of holden at

Sir,—I hereby request that you will serve the accompanying summons immediately, and return the enclosed copy of the same to me, with the affidavit of service required by sect. 62 of 9 & 10 Vic. c. 95.

The defendant [*or* witness] is stated to reside at [*here insert the full address given in the summons*].

Your obedient servant,

Registrar of the Court.

To the High-Bailiff of the county court of holden at

Notice of Non-service of a Summons.

No. [*of Plaint*].

In the County Court holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, That the summons in this cause has not been served, for the following reason:—

Dated this day of 18

E. F. Bailiff.

To the Defendant.

[1] The following is the form of a

Summons to obtain Judgment by Default on Personal Service.

No. [*of Plaint*].

In the [*title of court issuing summons*].

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

[*Name, Description, and Address of Defendant.*]

Take notice, That, unless at least six clear days before the [*day of appearance to summons*] you return to the registrar of this court at [*place of office*] the notice given below, dated and signed by yourself, or your attorney or your agent, you will not afterwards be allowed to make any defence to the claim which [*name, description, and address of plaintiff*] makes on you, as per margin, the particulars of which are hereunto annexed; but the plaintiff may, without giving any proof in support of such claim, proceed to judgment and execution. If you return such notice to the registrar within the time specified, you must appear at a county court to be holden at on the day of 185 at the hour of in the noon, to answer the above claim, which will be heard on that day.

	£	s.	d.
Claim			
Fee for plaint . .			
Attorney's costs .			
Total amount of debt and costs			

Dated this day of 185

Registrar of the Court.

(See back.)

[2] *Notice of Intention to Defend.*

No. [*of Plaint*].

In the [*title of court*].

A. B. *v.* C. D.

I intend to defend this cause.

Dated this day of 185

* Defendant.

[*To be Indorsed on the Summons.*]

If you pay the debt and costs, as per margin on the other side, into the registrar's office, before the day of hearing, and without returning the notice of intention to defend, you will avoid further costs.

If you do not return the notice of intention to defend, but allow judgment against you by default, you will *save half the hearing fee*, and the order upon such judgment will be to pay the debt and costs forthwith [*or* by instalments, *to be specified, as in plaintiff's written consent*].

If you admit a part only of the claim, you must return the notice of intention to defend

* Here must be signed the name of defendant, or of his attorney or agent, and in either of the two last cases the words "attorney for," or "agent for," must be added.

day, without giving any proof of his claim, have judgment entered up against the defendant for the amount of his claim and costs, such costs to be taxed by the registrar ; and the order upon such judgment shall be for payment forthwith, or at such time or times, and by such instalments, if any, as the plaintiff, or his attorney or agent, shall in writing have consented to take at the time of the entry of the plaint."

(*d*) *Effect of Summons with respect to Statute of Limitations.*[1]

within the specified time; and you may, by paying into the registrar's office the amount so admitted, together with costs proportionate to the amount you pay in, six clear days before the day of hearing, avoid further costs, unless the plaintiff at the hearing shall prove a claim against you exceeding the sum so paid.

If you intend to rely on a set-off, infancy, coverture, a statute of limitations, or a discharge under a bankrupt or insolvent act, as a defence, you must, in addition to the notice of intention to defend, give to the registrar notice of such special defence six clear days before the day of hearing; and such last-mentioned notice must contain the particulars required by the rules of the court; and you must deliver to the registrar as many copies of such notice as there are plaintiffs, and an additional copy for the use of the court. If your defence be a set-off, you must, with the notice thereof, also deliver to the registrar a statement of the particulars thereof. If your defence be a tender, you must pay into court, before or at the hearing, the amount tendered.

If you give such notice of intention to defend within the time specified, you may have the case tried by a jury, on giving notice in writing at the registrar's office, two clear days before the hearing, and on payment of five shillings for the use of such jury.

Summonses for witnesses and the production of documents may be obtained gratis at the office of the registrar of this court.

Hours of attendance at the office of the registrar of this court at [*place of office*] from ten till four.

This summons must be served *personally* on the defendant twelve clear days before the day appointed for the hearing.

If Notice to Defend be given, Action shall be tried.—19 & 20 Vic. c. 108, s. 29. "If the defendant shall give such notice as in the last preceding section is specified, the action shall be heard in the ordinary course ; but in any event the registrar shall, immediately after the last day for giving such notice, send a letter to the plaintiff by post, stating therein whether the defendant has or has not been served with such summons, and whether he has or has not given notice of his intention to defend."

Consent under Sect. 28 *of* 19 *&* 20 *Vic. c.* 108, *as to Time and Mode of Payment.*

No.

In the County Court of holden at

Between A. B. plaintiff,
and
C. D. defendant.

I [*or* the attorney of], the plaintiff, do consent that the defendant do pay the amount claimed in this action to the registrar of the court, on the day of 18 [*or* by instalments of for every days, the first instalment to be paid on the day of].

Dated this day of 18

Plaintiff [*or* 's attorney].

Notice of Service or Non-service of Summons, and of Intention, or not, to Defend to be sent, under the provisions of sect. 29 *of* 19 *&* 20 *Vic. c.* 108.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

You are hereby informed, that the defendant has [*or* has not] been served with the summons issued in this action [*when he has been served, add,* and that he has (*or* has not) given notice of his intention to defend the action].

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

[1] Rule 173. "Successive summonses may be issued without leave of the court, for the purpose of preventing the operation of any statute whereby the time for the commencement of any action is or may be limited, and the first and each subsequent summons shall be in force for twelve calendar months from the time of issuing the same, including the day of such issuing; and such subsequent summons shall be issued before the expiration of the previous summons and entered in the plaint book of the court: provided that on entering the plaint in the first instance the usual fee shall be paid; but for such subsequent summonses no further fee shall be paid, nor shall it be necessary that any attempt be made to serve the first summons or any successive summons, unless the plaintiff require the same; and such successive summonses shall be a continuance of the action on and from the day on which the first summons was issued."

R. 174. "Where a summons had been served in due time to prevent the operation of any statute of limitation, and either party dies after such service, and after the lapse of the period within which it is provided that an action may be brought, proceedings may be taken by or against the surviving party, or by or against the personal representative of the deceased party, within one year from

(D) *Notice of certain Defences.*

(*a*) *The Defendant must give Notice of Set-off, Infancy, Coverture, the Statute of Limitations, Bankruptcy, or Insolvency, in order to be able to avail himself of these Defences.*

The defendant must give notice of set-off, infancy, coverture, the Statute of Limitations, bankruptcy, or insolvency, in order to be able to avail himself of these defences.[1]

9 & 10 Vic. c. 95, sect. 76, enacts, "that no defendant in any court holden under this act shall be allowed to set off any debt or demand claimed or recoverable by him from the plaintiff, or to set up by way of defence and to claim and have the benefit of infancy, coverture, or any Statute of Limitations, or of his discharge under any statute relating to bankrupts, or any act for relief of insolvent debtors, without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the court shall have been given to the clerk of the court; and in every case in which the practice of the court shall require such notice to be given the clerk of the court shall, as soon as conveniently may be after receiving such notice, communicate the same to the plaintiff by the post, or by causing the same to be delivered at his usual place of abode or business: but it shall not be necessary for the defendant to prove on the trial that such notice was communicated to the plaintiff by the clerk."

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the day of holding the court at which the summons required the defendant to appear."

[1] Rule 66. "When the defendant intends to rely on a set-off, infancy, coverture of defendant, statute of limitations, or discharge of defendant under a bankrupt or insolvent act, his notice shall contain the particulars hereinafter mentioned with reference to such grounds of defence: Provided that in case of non-compliance with those rules which apply to such six grounds of defence, and of the plaintiff's not consenting at the hearing to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the hearing of the cause, to enable the defendant to give such notice."

R. 67. "Where a defendant intends to set off any debt or demand alleged to be due to him by the plaintiff, he shall give notice thereof in writing to the registrar of the court, and deliver to him a statement of the particulars of such set-off, at least five clear days before the return day of the summons."

R. 56. "Where a defendant intends to rely on the defence of infancy, he shall give notice thereof in writing to the registrar of the court at least five clear days before the return day of the summons, setting forth in such notice, as far as he is able, the place and date of his birth."

R. 69. "Where a defendant intends to rely on the defence of coverture, she shall give notice thereof in writing to the registrar of the court at least five clear days before the return day of the summons, setting forth in such notice, so far as she is able, the place and date of marriage, together with the Christian name and surname of her husband."

R. 70. "Where a defendant intends to rely on the defence of any statute of limitations, he shall give notice thereof in writing to the registrar of the court at least five clear days before the return day of the summons."

R. 71. "Where a defendant intends to rely on the defence of a discharge under any statutes relating to bankrupts, or for the relief of insolvent debtors, he shall give notice thereof in writing to the registrar of the court at least five clear days before the return day of the summons, setting forth in such notice the date of his certificate, discharge, or final order, and the court by which such certificate, discharge, or final order was granted or made."

R. 72. "In all cases mentioned in the last six rules the party thereby required to give the notice shall, unless otherwise expressly ordered, at least five clear days before the day of hearing, deliver to the registrar of the court as many copies thereof as there are opposite parties, and an additional copy to be filed; and the registrar shall, within twenty-four hours from the time of receiving the same, transmit by post one copy of such notice to each of the opposite parties."

R. 73. "Where the defence is a tender, such defence shall not be available unless before or at the hearing of the cause the defendant pays into court (which may be without costs) the amount alleged to have been tendered."

Notice of Set-Off.

No.

In the County Court of holden at

Between A. B. plaintiff.

and

C. D. defendant.

Take notice, That I intend at the hearing of this cause to claim a set-off against the plaintiff's demand, the particulars of which set-off are annexed hereto.

Dated this day of 18

The Defendant.

To the Registrar of the Court.

(E) *Payment of Money into Court.*

(*a*) *Payment into Court before Judgment.*

9 & 10 Vic. c. 95, s. 82, enacts, "that it shall be lawful for the defendant in any action brought under this act, within such time as shall be directed by the

Defendant may pay money into court.[1]

[*The Registrar is to annex to this notice the particulars of set-off, as furnished by defendant, sealed with the seal of the court.*]

Notice of Special Defence.

No.

[*Seal.*]

In the County Court of holden at

Between A. B. plaintiff.
and
C. D. defendant.

Take notice, That I intend at the hearing of this cause to give in evidence, and rely upon the following ground of defence:—

Dated this day of 18

The Defendant.

To the Registrar of the Court.

Infancy.

That I was an infant within the age of twenty-one years when the supposed claim arose [*or* the supposed contract or agreement was made], and that I was born, as I believe, at in the county of on the day of

Coverture.

That I am now [*or* that I was at the time when the supposed claim arose, *or* the supposed contract or agreement was made] the wife of of and that I was married to him at in the county of on the day of and that he resides at in the county of

Statute of Limitations.

That the claim for which I am summoned is barred by a Statute of Limitations.

Bankruptcy.

That I am a certificated bankrupt, and obtained my certificate from the Court [*or* district court] of Bankruptcy, on the day of

Insolvency.

That I was duly discharged under an Act for the Relief of Insolvent Debtors [*or* obtained a final order under the Protection Acts, 5 & 6 Vic. c. 116, and 7 & 8 Vic. c. 96] on the day of at the Court of held at

[1] Rule 61. "When the defendant is desirous of paying money into court, it shall, except where otherwise expressly provided, be paid five clear days before the return day of the summons, with court fees proportionate to the amount paid in, and the attorney's costs where the amount paid in exceeds 20*l.*; and the registrar shall, within twenty-four hours from the time of such payment, send to the plaintiff notice thereof by post: Provided that at any time before the return day the defendant may pay money into court with such costs as aforesaid, and the registrar shall give notice thereof to the plaintiff as aforesaid; but where money is so paid in less than five clear days before the return day, it shall be lawful for the court to order the defendants to pay such costs as the plaintiff shall have incurred in preparing for trial, before the notice of such payment was received by him, or in attending the court."

R. 62. "If the plaintiff elect to accept in full satisfaction of his claim, including costs, such money as shall have been paid into court by the defendant, and shall send to the registrar and to the defendant, by post, or leave at the registrar's office, and at the defendant's place of dwelling, or place of business, a written notice, stating such acceptance, within such reasonable time before the return day as the time of payment by the defendant has permitted, the action shall abate, and the plaintiff shall not be liable to any further costs. But in default of such notices from the plaintiff the cause may proceed."

Notice of Payment into Court of whole Claim.

No. [*of Plaint*].

[*Seal.*]

In the County Court of holden at

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, That the defendant has paid into court the full amount of your demand in this action, together with your costs therein.

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

N. B. Upon your applying for the above amount, it will be necessary that you should produce the plaint note given to you on the entry of the plaint.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Notice of Payment of Part of Claim into Court.

No. [*of Plaint*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, That the defendant has paid into court the sum of £ together with costs proportionate to that sum. If you elect to accept the same in full satisfaction of the sum claimed, and send to the registrar of this court, and to the defendant, a

rules made for regulating the practice of the court, to pay into court such sum of money as he shall think a full satisfaction for the demand of the plaintiff, together with the costs incurred by the plaintiff up to the time of such payment; and notice of such payment shall be communicated by the clerk of the court to the plaintiff by post, or by causing the same to be delivered at his usual place of abode or business, and the said sum of money shall be paid to the plaintiff; but if he shall elect to proceed, and if the plaintiff shall recover no further sum in the action than shall have been so paid into court, the plaintiff shall pay to the defendant the costs incurred by him in the said action after such payment, and such costs shall be settled by the court, and an order shall thereupon be made by the court for the payment of such costs by the plaintiff."

(F) *Set-off.* *See ante*, p. 366.

(G) *Confession of Debt.*

(*a*) *The Defendant may Confess the Debt in Whole or in Part.*

Confession of debts or parts of debts, &c., and judgment thereupon.[1]

13 & 14 Vic. c. 61, s. 8. "And be it enacted, that any person against whom a plaint shall be entered in any county court may, if he think fit, whether he be summoned upon such plaint or not, in the presence of the clerk or assistant clerk of the court in which such plaint shall have been entered, or one

written notice forthwith, by post, or by leaving the same at the registrar's office, and at the defendant's place of abode or business, the action will be discontinued, and you will be liable to no further costs. In default of such notice the action may proceed, and if you do not appear at the hearing, you will be liable to pay to the defendant such costs as he may incur for appearing at the hearing, or such other sum of money as the judge may order for expenses subsequent to the payment into court.

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

N. B. Upon your applying for the above amount, it will be necessary that you should produce the plaint note given to you on the entry of the plaint.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] Rule 183. "All confessions under s. 8 of 13 & 14 Vic. c. 61, shall be delivered to the registrar five clear days before the return day of the summons: Provided that, at any time before the cause is called on, the defendant may confess and admit the claim according to the form set forth in the schedule, subject however to an order by the judge to pay such costs as the plaintiff has incurred in consequence of the defendant's not having delivered such confession as hereinbefore required."

Admisssion of Claim, or Part of Claim, under s. 8 of 13 & 14 Vic. c. 61.

(A.)

No. [*of Plaint*].

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

I, the defendant, do here confess and admit that the sum of £ the amount claimed [*or* the sum of £ being part of the amount claimed by the plaintiff in this action, is due to him from me [and that I will pay the same by instalments of].

Dated this day of 18

Signed in the presence of defendant.

This paper, marked A., is the statement referred to in the annexed affidavit:—

Affidavit of Signature to Admission, s. 8 of 13 & 14 Vic. c. 61.

No. [*of Plaint*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,

and

C. D. defendant.

I, of gentleman, or attorney of her Majesty's Court of at Westminster, make oath and say that I was present on the day of one thousand eight hundred and sixty- and did see the above-named defendant sign the statement hereunto annexed, marked with the letter A, and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement, as the witness attesting the same, is in my handwriting.

Sworn at in the county of this day of one thousand eight hundred and sixty- , before me.

Notice to Plaintiff of Admission of Claim under s. 8 of 13 & 14 Vic. c. 61.

No. [*of Plaint*].

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

I do hereby give you notice, That the defendant has filed a statement confessing and

of their clerks respectively, or in the presence of an attorney of one of the superior courts, sign a statement confessing and admitting the amount of the debt or demand, or part of the amount of the debt or demand for which such plaint shall have been entered, and such clerk or assistant-clerk shall, as soon as conveniently may be after receiving such statement, send notice thereof to the plaintiff by the post, or by causing the same to be delivered at his usual place of abode or business, and thereupon it shall not be necessary for the said plaintiff to prove the debt or demand so confessed and admitted as aforesaid, but the judge of such court, at the next sitting of such court, whether the parties or either of them attend such court or not, shall, upon proof by affidavit of the signature of the party, if such statement were not made in the presence of the clerk or assistant-clerk, proceed to give judgment for the debt or demand so confessed and admitted, in the same manner, and subject to the same conditions, as if he had tried the cause, and given judgment thereupon, under the provisions of the said first-recited act."

(H) *Agreement as to Amount of Debt.*

Agreement as to the amount of debt, &c., and conditions of payment.[1]

13 & 14 Vic. c. 61, s. 9. "And be it enacted, that if the person against whom a plaint shall be entered in any county court can agree with the person on whose behalf such plaint shall have been entered upon the amount of the debt or demand in respect of which such plaint shall have been entered, and

admitting the amount claimed by you [and agreeing to pay the same by instalments of], and that it will not be necessary for you to prove the claim on the day of hearing; but you must attend the court to apply to the judge for an order for payment.

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

N.B. The fee to be paid upon you making such application will be shillings [*here state the actual amount to be paid*].

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Notice to Plaintiff under s. 8 *of* 13 *&* 14 *Vic. c.* 61, *of Admission of part of Claim.*

No. [*of Plaint*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

I do hereby give you notice that the defendant has filed a statement confessing and admitting £ part of the amount claimed by you, and that it will not be necessary for you to move for part of your claim which the defendant has so admitted on the day of hearing. If, however, you do not consent to accept the sum, or accept the sum so admitted in satisfaction of your demand, you must be prepared to prove the excess; but, at all events, you must attend the court to apply to the judge for an order for payment.

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

N.B. The fee to be paid upon your making such application will be [*here state the actual amount to be paid*].

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] Rule 184. "In all cases of consent under sect. 8 of 13 & 14 Vic. c. 61, the defendant may confess the amount of the plaintiff's costs besides the court fees, and the judgment may be entered accordingly, and the amount of the plaintiff's costs shall be stated separately.

Admission under sect. 9 *of* 13 *&* 14 *Vic. c.* 61.

(A.)

No. [*of Plaint*].

In the County Court of holden at

[*Seal.*] Between A. B. plaintiff,
and
C. D. defendant.

We, the plaintiff and defendant, do hereby agree, that the amount of the debt or demand due from the defendant to the plaintiff is £ and that the sum, with £ for the plaintiff's costs, and £ the court fees, shall be paid to the registrar of the court at his office, in manner following, that is to say:—

Dated this day of 18

Signatures of Plaintiff and Defendant.

Signed in the presence of

This paper, marked "A.," is the statement referred to in the annexed affidavit.

Affidavit of Signature under sect. 9 *of* 13 *&* 14 *Vic. c.* 61.

No. [*of Plaint*].

In the County Court of holden at

Between A. B. plaintiff,
and
C. D. defendant.

upon the terms and conditions upon which the same shall be paid or satisfied, it shall be lawful for such persons respectively, in the presence of the clerk or assistant-clerk of the court in which such plaint shall have been entered, or one of their clerks respectively, or in the presence of an attorney of one of the superior courts, to sign a statement of the amount of the debt or demand so agreed upon between such persons respectively, and of the terms and conditions upon which the same shall be paid or satisfied; such clerk or assistant-clerk shall receive such statement, and shall thereupon, upon proof by affidavit of the signature of the party, if such statement were not made in the presence of the clerk or assistant-clerk, enter up judgment for the plaintiff for the amount of the debt or demand so agreed on, and upon the terms and conditions mentioned in such statement; and such judgment shall, to all intents and purposes, be the same, and have the same effect, and shall be enforced and enforceable in the same manner, as if it had been a judgment of the judge of the said court."

(I) *Withdrawal by Plaintiff.*

Plaintiff may give notice of discontinuing process.

Rule 164 provides that, "if the plaintiff be desirous of not proceeding in the cause, he may give notice thereof to the registrar and to the defendant by post; and after the receipt of such notice the defendant shall not be entitled to any further costs than those incurred up to the receipt of such notice, unless the judge shall otherwise order."

(J) *Reference of Suit to Arbitration.*

(*a*) *Suits may be Settled by Arbitration.*

The judge has authority, with consent of the parties, to refer the matter to arbitration.[1]

9 & 10 Vic. c. 95, s. 77, enacts, "that the judge may in any case, with the consent of both parties to the suit, order the same, with or without other matters within the jurisdiction of the court in dispute between such parties, to be referred to arbitration, to such person or persons, and in such manner, and on such terms, as he shall think reasonable and just; and such reference shall not be revocable by either party, except by consent of the judge; and the award of the arbitrator or arbitrators, or umpire, shall be entered as the judgment, and shall be as binding and effectual to all intents as if given by the judge: Provided that the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside any such award so given as aforesaid, or may, with the consent of both parties aforesaid, revoke the reference, or order another reference to be made in the manner aforesaid."

I, of gentleman, an attorney of her Majesty's Court of at Westminster, make oath and say, that I was present on the day of one thousand eight hundred and and did see the plaintiff and defendant respectively sign the statement hereunto annexed, marked with the letter A., and that the name set to the said statement is in the handwriting of the plaintiff, and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement, as the witness attesting the same, is in my handwriting.

Sworn at in the county of this day of one thousand eight hundred and sixty before me

[1] Rule 175. "Where a plaint is entered, the judge may, with the consent of the parties, as well in cases within the ordinary jurisdiction of the court as in cases of agreement under sect. 23 of 19 & 20 Vic. c. 108, make an order for a reference under the provisions of sect. 77 of 9 & 10 Vic. c. 95, before, upon, or after the return day of the summons; and all the provisions in the last-mentioned act contained as to references shall apply to a reference proceeding under such an order: Provided that the same fees shall be paid as would have been payable on the hearing of the cause."

Where the parties to a plaint in the county court appeared before the judge, and consented to a reference without objecting to the want of jurisdiction, but one of them, during the progress of the arbitration, objected to the want of jurisdiction of the arbitrators, on the ground that title to land came in question, and the arbitrators proceeded with the reference, it was held that he was entitled to a prohibition. *Knowles v. Holden*, 24 L. J. Ex. 223.

(K) *Abatement of Action.* *See* vol. i. pp. 6, 7.

(L) *Amendment of Proceedings.*[1] *See* id. p. 344.

(M) *Second Suit for same Cause of Action.*

No second suit in second court for the same cause.

13 & 14 Vic. c. 61, s. 18, enacts, "that if any party shall sue another in any county court for any debt or other cause of action for which he hath already sued him, and obtained judgment, in any other court, the proof of such former suit having been brought and judgment obtained may be given, and the party so suing shall not be entitled to recover in such second suit, and shall be adjudged to pay three times the costs of such second suit to the opposite party."

"No action can be brought in a county court on any judgment of a superior court." 19 & 20 Vic. c. 108, s. 27.

(N) *Change of Venue.*

If judge satisfied that cause may be more conveniently tried in another county court, he shall order that the venue be changed.[2]

19 & 20 Vic. c. 108, s. 22, enacts, "if a judge of a county court shall be satisfied by either party to a cause pending in his court, that such cause can be more conveniently or fairly tried in some other county court, he shall order that the venue be changed, and that the cause be sent for hearing to such other county court; or if the judge shall be interested in the matter of any cause pending in his court, he shall order that the venue be changed, and that the cause be sent for hearing to some convenient county court of which he is not the judge, at his discretion; and in either case the registrar of the court in which the plaint was entered shall forthwith transmit to the registrar of the

Proof of the order of reference made by a judge will support an allegation that the plaintiff and defendant mutually referred the action, &c., in the county court. *Roper v. Levy*, 7 Ex. 55.

Order of Reference to Arbitration.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

By the consent of the plaintiff and defendant it is, at a court holden this day, ordered that all matters in difference in this cause (and all other matters within the jurisdiction of the court in difference between the said parties), shall be referred to of whose certificate, to be made or given on or before the day of 18 shall be entered as the judgment in this cause. And it is further ordered, that the time for making or giving such certificate may be from time to time enlarged by the judge of the court, in his discretion, for such time as he shall by indorsement to be by him made on this order direct; and that the said certificate, when made or given, may be referred back again to the said arbitrator at the like discretion of the said judge, without the further consent of the said parties; and in case either of the said parties shall neglect or refuse to attend any appointment that may be made by the said arbitrator for proceeding under this order, after two days' notice in writing shall have been given to him, by serving the same personally, or by leaving it at his last or usual place of abode, the said arbitrator shall be at liberty to proceed *ex parte* on the matters of the said reference, and his certificate shall be as valid as if both the said parties had duly attended before him. And it is further ordered, that the costs of the said reference shall be in the discretion of the said arbitrator, and that the costs of the reference shall abide the event. And it is lastly ordered, that the submission to arbitration shall not be revocable by either party.

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

[1] There is an extensive power of amendment in the county courts. By the 57th sect. of 19 & 20 Vic. c. 108, "the judge of a county court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."

The rules of court on the subject are given vol. i. p. 344.

[2] *Order for Changing the Venue under either sect. 20 or 22 of 19 & 20 Vic. c. 108.*

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

court to which the cause is to be sent, a certified copy of the plaint as entered in the plaint book, the duplicate copy of the summons and particulars served on the defendant, and a certified copy of the order for changing the venue, and the judge of such last-mentioned court shall appoint a day, notice whereof shall be sent by post or otherwise by the registrar, to both parties."

(O) *Of the Summoning &c. of Witnesses.*

(*a*) *Summonses to Witnesses are issued on the Application of either Party.*

Summonses to witnesses are issued on the application of either party.[1]

9 & 10 Vic. c. 95, s. 85, enacts, "that either of the parties to the suit or any other proceeding under this act may obtain, at the office of the clerk of the court, summonses to witnesses, to be served by one of the bailiffs of the court, with or without a clause requiring the production of books, deeds, papers, and writings in their possession or control, and in any such summons any number of names may be inserted."

It is ordered, That the venue in the above cause be changed, and that the cause be sent for hearing to the county court of holden at

Given under the seal of this court this day of 18

By the Court,

Registrar of the Court.

To the Plaintiff and Defendant.

Notice by Court to which an Action has been sent of the Day of Hearing.

No.

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

Take notice, That the above cause has been sent for hearing to this court, and that it is appointed to be heard in this court on the day of 18 at the hour of in the noon.

Given under the seal of this court this day of 18

Registrar of the Court.

To the Plaintiff and Defendant.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] *Witnesses neglecting Summons.*—By the 86th section of 9 & 10 Vic. c. 95, it is provided, "that every person on whom any such such summons shall have been served, either personally or in such other manner as shall be directed by the general rules of practice of the courts, and to whom at the same time payment or a tender of payment of his expenses shall have been made, on such scale of allowance as shall be from time to time settled by the general rules of practice of the court, and who shall refuse or neglect without sufficient cause to appear, or to produce any books, papers, or writings required by such summons to be produced, and also every person present in court who shall be required to give evidence, and who shall refuse to be sworn and give evidence, shall forfeit and pay such fine, not exceeding ten pounds, as the judge shall set on him, and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the general fund of the court in which the fine was imposed."

Rule 74. "Summonses to witnesses may be issued without leave of the court, to be served either in the home or in any foreign district."

Rule 75. "It shall be sufficient if a summons to a witness be served a reasonable time before the actual hearing."

Every person who in any examination upon oath or solemn affirmation before any judge of the county court wilfully and corruptly gives false evidence is guilty of perjury. 9 & 10 Vic. c. 95, s. 84.

Summons to Witness.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,

and

C. D. defendant.

You are hereby required to attend at [the court-house in] on the day of 18 at the hour of in the noon to give evidence in the above cause on behalf of the [plaintiff or defendant, *as the case may be*] and then and there to have and produce [*state any particular documents required*] and all other books, papers, writings, and other documents relating to the said action which may be in your custody, possession, or power. In default of your attendance you will be liable to a penalty of ten pounds, under 9 & 10 Vic. c. 95.

Dated this day of 18

To Registrar of the Court.

Order fining a Witness for Non-Attendance.

No.

In the County Court of holden at

[*Seal.*] Between A. B. plaintiff,

and

C. D. defendant.

Whereas of was duly summoned to appear as a witness in this cause at a court this day holden, and at the time of being so summoned payment [*or* a tender of payment] of his expenses was made, according to the scale of allowance settled by the rules of practice of the county courts; and whereas he has neglected, without sufficient cause shown, to appear at the court [*or* to produce] [*here describe what he was required by such summons to produce*]; *or*, * Whereas being this day present in court, and being required by the court to give evidence in this cause, refused to be sworn, without alleging as a ground for such refusal that he had any conscientious scruples with respect to taking an oath [*or*, after being duly sworn] refused to give evidence [*or* to produce] [*here describe what he was required and bound to produce*]: It is hereby ordered, That the said shall forthwith [*or* on the day of] pay to the registrar of this court a fine of £ for such neglect [*or* refusal].

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Warrant of Execution against the Goods of a Witness for a Fine.

No. [*of Warrant*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas was duly summoned to appear as a witness in this cause at a court holden at on the day of and at the time of being so summoned payment of his expenses was made, according to the scale of allowance settled by the rules of practice at county courts; and whereas he neglected, without sufficient cause shown, to to appear at such court [*or* to produce] [*here describe what he was required and bound to produce*]; *or*, * Whereas being present in the court on the day of 18 and being required by the court to give evidence, refused to be sworn, without alleging as a ground for such refusal that he had any conscientious scruples with respect to taking an oath [*or*, after being duly sworn, refused to give evidence or to produce, &c.]: It was thereupon ordered by the court that he should forthwith [*or* on the day of] pay to the registrar of this court a fine of £ for such neglect [*or* refusal]. And whereas the said sum has not been paid according to the said order, and the judge of this court has ordered it to be levied as hereinafter mentioned. These are, therefore, to require and order you forthwith to make and levy by distress and sale of goods and chattels of the said wheresoever they may be found, within the district of this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds) the sum stated at the foot of this warrant, being the amount of such fine and the costs of this execution, and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to him, which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution hereof.

Given under the seal of this court this day of 18

By the Court.

To the High-Bailiff of the Court, and others the Bailiffs thereof.

	£	s.	d.
Amount of fine			
Poundage for issuing this warrant			
Total . . . £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said witness.

Application was made to the registrar for this warrant at minutes past the hour of in the noon in the day of 18

The county-court judge may, by an order under his hand and the seal of the court, require a prisoner (except under process in any civil action, suit, or proceeding) to be brought up to be examined as a witness. A tender must be made to the person having the custody of the prisoner of the expenses of bringing up the prisoner. 19 & 20 Vic. c. 108, s. 31.

The following is the form of

Affidavit to obtain a Warrant under sect. 31 *of* 19 & 20 *Vic. c.* 108.

No. [*of Plaint*].

In the County Court of holden at

Between A. B. plaintiff,
and
C. D. defendant.

I, of the plaintiff [*or* defendant] make oath and say, that the above cause is appointed to be tried at this court on the day of 18 and that E. F. now a prisoner confined in [*state the prison*] will be a material witness for me

* Where witness is present in court commence from here.

(P) *Of the Demand and Summoning of a Jury.*

Actions tried by a jury when parties require it.[1]

9 & 10 Vic. c. 95, s. 70, enacts, "that in all actions where the amount claimed shall exceed 5*l.* it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed shall not exceed 5*l.* it shall be lawful for the judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury; and in every case such jury shall be summoned according to the provisions hereinafter contained: Provided always, that the party requiring a jury to be summoned shall give to the clerk of the court, or leave at his office, such notice thereof as shall be directed by the rules made for regulating the practice of the court as hereinafter provided; and the said clerk shall cause notice of such demand of a jury, made either by the plaintiff or defendant, to be communicated to the other party to the said action, either by post, or by causing the same to be delivered at his usual place of abode or business: but it shall not be necessary for either party to prove on the trial that such notice was communicated to the other party by the clerk."

---

upon the said trial. And I further say that I am advised and verily believe that I cannot safely proceed to the trial of the said cause without the testimony of the said E. F. And I do hereby make application to the judge of this court for a warrant, in order that the said E. F. may be brought before this court to be examined as a witness on my behalf.

Sworn at in the county of the day of one thousand eight hundred and before me

Warrant to bring up a Prisoner to give Evidence under Sect. 31 *of* 19 *&* 20 *Vic. c.* 108.

No. [*of Plaint*].

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

To [*officer in whose custody this prisoner is*].

Whereas the plaintiff [*or* defendant] hath made application to me, by affidavit, for a warrant to bring up before this court E. F. that he may be examined as a witness on behalf of the said plaintiff [*or* defendant] in a certain cause depending in this court between the said A. B. plaintiff, and C. D. defendant: You are therefore hereby required to bring the said E. F. before this court at [*court-house*] on the day of 18 at o'clock in the noon, then and there to be examined as a witness on behalf of the said plaintiff [*or* defendant]; and immediately after the said E. F. shall have given his testimony before this court, that you safely conduct him, the said E. F., to the prison from which he shall have been brought under this warrant.

Given under the seal of the court, the day of 18

Judge of the Court.

[1] By the 9 & 10 Vic. c. 95, s. 71, it is enacted, "that every party requiring any jury to be summoned shall, at the time of giving the said notice, and before he shall be entitled to have such jury summoned, pay to the clerk of the court the sum of five shillings for payment of the jury, and such sum shall be considered as costs in the cause, unless otherwise ordered by the judge."

By the 72d sect. "the sheriff of every county, and the high-bailiffs of Westminster and Southwark, shall cause to be delivered to the clerk of the court a list of persons qualified and liable to serve as jurors in the courts of assize and *nisi prius* for their county, city, and borough respectively, within fourteen days from the receipt of the jury book from the clerk of the peace of the county or other officer, each list containing only the names of persons residing within the jurisdiction of the court, for which list the said sheriffs and high-bailiffs shall be entitled to receive, out of the general fund of the court, a fee after the rate of two pence for every folio of seventy-two words. And whenever a jury shall be required, the clerk of the court shall cause so many of the persons named in the list as shall be needed, in the opinion of the judge, to be summoned to attend the court at a time and place mentioned in the summons, and shall administer and cause to be administered to such of them as shall be impanelled to try any cause or causes on oath, to give true verdicts according to the evidence; and the persons so summoned shall attend at the court at the time mentioned in the summons, and in default of attendance shall forfeit such sum of money as the judge shall direct, not being more than five pounds for each default; and the delivery of such summons to the person whose attendance is required on such jury, or delivery thereof to his wife or servant, or any inmate, at his usual place of abode, trading, or dealing, shall be deemed good service: Provided always, that no person shall be summoned or compelled to serve on such jury more than twice within one year, or who shall have been summoned and shall have attended upon any jury at the assizes, or any court of *nisi prius*, or at the Central Criminal Court, for the same county, within six calendar months next before the delivery of

such summons."

Rule 77. "Notice of a demand of a jury shall be made in writing to the registrar of the court three clear days before the day of hearing, and the summonses to the intended jurors shall be delivered to the bailiff forthwith."

R. 78. "Where notice of a demand of a jury has not been given in due time, or if at the hearing both parties desire to try by a jury, the judge may, on such terms as he shall think fit, adjourn the cause, in order that the necessary steps for such trial may be taken, and the trial shall take place accordingly."

R. 79. "Cases of interpleader and of replevin may, at the instance of either party, be tried by a jury."

By the 73d sect. of 9 & 10 Vic. c. 95, it is enacted, that "whenever there are any jury trials five jurymen shall be impanelled and sworn, as occasion shall require, to give their verdicts in the causes which shall be brought before them in the said court, and being once sworn shall not need to be resworn in each trial; and either of the parties to any such cause shall be entitled to his lawful challenge against all or any of the said jurors, in like manner as he would be entitled in any superior court; and the jurymen so sworn shall be required to give an unanimous verdict." But by rule 80, subsequently made, "the number of jurymen summoned to attend at a court for the trial of causes shall be ten, unless the judge shall otherwise order."

Registrar's Notice of Jury.

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Take notice, That this cause will be tried the having demanded a jury therein.

Dated this day of 18

Registrar of the Court.

To the Plaintiff [*or* Defendant].

Summons to Jurors.

In the County Court of holden at [*Seal*].

You are hereby summoned to appear and serve as a juror in this court, at the on the day of 18 at the hour of in the noon, upon the trial of the cause or causes to be then and there tried by jury, and in default of attendance you will be liable to a penalty of five pounds, under s. 72 of 9 & 10 Vic. c. 95.

Given under the seal of the court this day of 185

Registrar of the Court.

To of

Order fining a Juror for Non-Attendance.

In the County Court of holden at [*Seal.*]

Whereas was duly summoned to appear and serve this day as a juror in this court, upon the trial of the cause or causes to be tried by a jury at this court, and whereas he has neglected, without sufficient cause shown, to appear and serve as a juror at this court: It is hereby ordered, that he shall forthwith [*or* on the day of] pay to the registrar of this court a fine of £ for such neglect.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Warrant of Execution against the Goods of a Juror for a Fine.

No. [*of Warrant*].

In the County Court of holden at [*Seal.*]

Whereas was duly summoned to appear and serve as a juror at a court holden on the day of upon the trial of any cause or causes to be then and there tried by jury: And whereas he neglected, without sufficient cause shown, then to appear and serve as a juror at such court: It was thereupon ordered by the court that he should forthwith [*or* on the day of], pay to the registrar of this court a fine of £ for such neglect: And whereas the said sum has not been paid according to the said order, and the judge of this court has ordered it to be levied as hereinafter mentioned: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the said wheresoever they may be found within the district of this court (excepting the wearing-apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount of such fine, and the costs of this execution; and also seize and take any money or bank-notes (whether of the Bank of England or any other bank), any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money, belonging to him, which, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and pay what you shall have so levied to the registrar of this court, and make a return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the Court and others the Bailiffs thereof.

Registrar of the Court.

	£	s.	d.
Amount of fine			
Poundage for issuing this warrant			
Total . . . . . £			

(Q) *Admission of Documents.*

Notice to admit may be given.

Rule 76. "Where either party proposes to give a judgment of a superior court, or any other document, whether printed or written, in evidence, he may by a demand in writing, made a reasonable time before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such documents in evidence), the document to be read in evidence without proof; and if such demand be not made, no costs of proving such document shall be allowed, unless the judge shall otherwise order. If such demand be not complied with, and the judge think it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the event of the cause."

(R) *Inspection of Documents.*

A party may give notice to the opposite party requiring an inspection of documents material to his cause.

Rule 63. "Where in any action the plaintiff or defendant is desirous of inspecting any written or printed document or instrument in which he has an interest, and to the production of which he is entitled for the purposes of action, and which shall be in the possession, or power, or under the control of the other party, such plaintiff or defendant may, five clear days before the day of hearing, give notice to the other party, by post or otherwise, that he or his attorney desires to inspect any such document or instrument, describing the same, at any place to be appointed by the other party; and if such other party shall neglect or refuse to appoint such place, or to allow such plaintiff or defendant, or his attorney, to inspect such document or instrument within three days after receiving such notice, the judge may in his discretion, on the day of hearing, adjourn the cause, and make such order as to costs as he shall think fit."

(S) *Notices.*[1]

(T) *Affidavits.*[2]

IV. Of the Hearing.

(A) *Judge may grant Time, or adjourn the Hearing.*

Judge may grant time to either party, or may adjourn the hearing.[3]

9 & 10 Vic. c. 95, s. 81, enacts, "that the judge may in any case make orders for granting time to the plaintiff or defendant to proceed in the prosecution or defence of the suit, and also may from time to time adjourn any court, or the hearing or further hearing of any cause, in such manner as to the judge may seem fit."

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said juror.

Application was made to the registrar for the warrant of this at minutes past the hour of in the noon of the day of 18

[1] Rule 170. "Where by these rules any party is required to give notice according to a form mentioned in the schedule, it shall be sufficient if the notice given complies substantially with such form."

R. 171. "In all cases where any notice or thing is required by these rules to be given or done within a period of twenty-four hours, or within a period of forty-eight hours, no part of Sunday, Christmas-day, or Good Friday, or of any day appointed by royal proclamation for a public fast, humiliation, or thanksgiving, shall be included in the computation of such period."

R. 172. "All letters or process sent by post by the officers of the court shall be prepaid."

[2] "Any affidavit to be used in a county court may be sworn before a judge or registrar of a county court, without the payment of any fee, or before a commissioner to administer oaths in Chancery in England, or a London commissioner to administer oaths in Chancery, or a commissioner for taking affidavits in any superior court, such commissioners respectively not being registrars, or before a justice of the peace." 19 & 20 Vic. c. 108, s. 58.

[3] Rule 81. "The parties to any cause, at any time before the cause is called on, may by consent, and without payment to any hearing fee, postpone the hearing to such subsequent court, as the judge shall direct."

R. 82. "Where a cause is adjourned, no

(*a*) *Form of Order to Adjourn Proceedings.*[1]

(B) *In case of Non-appearance of Defendant, Judge may hear the Case on Proof of Service of Summons.*

9 & 10 Vic. c. 95, s. 80, enacts, "that if on the day so named in the summons, or at any continuation or adjournment of the court or cause in which the summons was issued, the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in court, the judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended: Provided always, that the judge in any such case, at the same or any subsequent court, may set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new trial of the cause upon such terms, if any, as to payment of costs, giving security for debt or costs, or such other terms as he may think fit, on sufficient cause shown to him for that purpose."

(C) *In case of Non-appearance of Plaintiff the Cause may be struck out; or if he appear, and fail to prove his case, he may be Nonsuited, or Judgment given for the Defendant.*

9 & 10 Vic. c. 95, s. 79,[2] enacts, "that if upon the day of the return of any summons, or at any continuation or adjournment of the said court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear, but shall not make proof of his demand to the satisfaction of the court, it shall be lawful for the judge to nonsuit the plaintiff, or to give judgment for the defendant; and in either case, where the defendant shall appear and shall not admit the demand, to award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as the judge in his discretion shall think fit, and such sum shall be recoverable from the plaintiff by such ways and means as

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order of adjournment shall be served on either party, unless by direction of the judge."

R. 83. "When anything required by the practice of the court to be done by either party, before or during the hearing, has not been done, the judge may in his discretion, and on such terms as he shall think fit, adjourn the hearing to enable the party to comply with the practice."

If, by reason of the death or unavoidable absence of the judge, a county court cannot be held, the court may be adjourned by the registrar, or, in the event of his unavoidable absence, by the high-bailiff. 19 & 20 Vic. c. 108, s. 7.

[1] *Order to adjourn Proceedings.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

It is ordered, That the trial of this action be adjourned until the day of 18 at o'clock in the noon.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

[2] This enactment does not empower the judge to nonsuit and award costs where the case is out of his jurisdiction; but his power to nonsuit is confined to cases over which the court has authority. Where the plaintiff might be able conclusively to prove the causes of action mentioned in the summons, but for the objection to the jurisdiction on the part of the defendant, the court has merely the power to declare its own incompetency at the trial, and direct that the suit shall abate for the want of jurisdiction, is merely an abatement of the suit. The provision over costs in the 88th sect. of 9 & 10 Vic. c. 95, only applies to cases within the jurisdiction of the county court to hear and determine. *Lawford v. Partridge*, 1 H. & N. 621; 26 L. J. Ex. 147.

The judge has no authority by virtue of this section to nonsuit a plaintiff against his consent (*Clarke v. Stancliffe*, 7 Ex. 439; 21 L. J. Ex. 129), even in cases tried by the judge without a jury. *Outhwaite v. Hudson*, 7 Ex. 380; 21 L. J. Ex. 151. The plaintiff may elect to be nonsuited at any time before the jury have delivered their verdict; or, if the cause be tried by a judge alone, at any time before he has delivered his judgment. *Outhwaite v. Hudson, supra. Robinson v. Lawrence*, 7 Ex. 123.

any debt or damage ordered to be paid by the same court can be recovered: Provided always, that if the plaintiff shall not appear when called upon, and the defendant, or some one duly authorised on his behalf, shall appear and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the court, if it shall think fit, may proceed to give judgment as if the plaintiff had appeared."

(*a*) *Form of Judgment for Defendant, or Nonsuit.*[1]

(*b*) *If Defendant appears and Plaintiff do not, Costs may be awarded to the Defendant.*

If plaintiff or his attorney do not appear on day of hearing, costs may be awarded to defendant for his trouble and attendance.[2]

13 & 14 Vic. c. 61, s. 10. "And be it enacted, that in every case where the plaintiff shall not appear, either by himself or his attorney, upon the day of the return of any summons for hearing, or at any continuation or adjournment of the said hearing, and the defendant shall appear either by himself or his attorney upon such day of hearing, continuation, or adjournment, it shall be lawful for the judge to award to the defendant, or to his attorney, by way of costs of his attendance and satisfaction for his trouble, such sum as the judge in his discretion shall think fit; and the sum so awarded shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same court can be recovered."

(*c*) *Form of Order for Costs.*[3]

(D) *The Judge tries the Cause in a Summary Way, upon the Answer of the Defendant in Court.*

9 & 10 Vic. c. 95, s. 74, enacts, "that on the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to appear to answer such plaint; and on answer being made in court the judge shall proceed in a summary way to try the cause, and give judgment, without further pleading or formal joinder of issue."

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[1] *Judgment for Defendant, or of Nonsuit.*

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause at a court holden this day, it is adjudged that judgment be be entered for the defendant [*or* that judgment of nonsuit be entered], and that the plaintiff do pay the sum of £ for the defendant's costs:

And it is ordered that the plaintiff do pay the same to the registrar of this court on the day of

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] R. 85. "If, at the return day of the summons, or at any adjournment of the court at which it is returnable, the plaintiff does not appear, and the defendant does appear, and does not admit the plaintiff's demand, the judge may in his discretion award to the defendant costs in the same manner and to the same amount, as to counsel, attorney, witnesses, and other matters, as if the cause had been tried, but no hearing fee shall be charged.

[3] *Order for Costs to Defendant where Plaintiff does not appear.*

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas the plaintiff has not appeared, either by himself, his attorney, or agent, at the court holden this day, being the day appointed for the trial of this cause, and the defendant has appeared in person [*or* by his attorney or agent], and has not admitted the demand: It is awarded that the plaintiff do pay the sum of £ for the defendant's costs; and it is ordered that the plaintiff do pay the same to the registrar of the court on the day of 18

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

(E) *Judge determines Questions of Law and Fact, unless a Jury are Summoned.*[1]

9 & 10 Vic. c. 95, s. 69. "And be it enacted, that the judge of the county court shall be the sole judge in all actions brought in the said court, and shall determine all questions as well of fact as of law, unless a jury shall be summoned as hereinafter mentioned; and no suitors shall in any case be summoned to hold or have any jurisdiction in any court holden under this act."

(F) *The Plaintiff is Confined to the cause of Action stated in the Summons.*

9 & 10 Vic. c. 95, s. 75, enacts, "that no evidence shall be given by the plaintiff on the trial of any cause as aforesaid of any such demand or cause of action, except such as shall be stated in the summons hereby directed to be issued."

(G) *Appearance by Barrister or Attorney.*[2]

(H) *With Consent of the Parties in writing Judge may determine Cause, notwithstanding Title comes in question.*

19 & 20 Vic. c. 108, s. 25, enacts, that "in any action in the county court in which the title to any toll, fair, market, or franchise shall incidentally come in question, the judge shall have power to enforce the claim, which it is the immediate object of the action to enforce, if both parties, at the hearing, shall consent, in any writing signed by them or their attornies, to the judge having such power; but the judgment of the court shall not be evidence of title between the parties or their privies in any other action in that court, or in any proceedings in any other court, and such consent shall not prejudice or affect any right of appeal of either of the parties to such first-mentioned action."

With consent of the parties in writing, judge may determine cause, notwithstanding title comes in question.

(*a*) *Form of Consent.*[3]

(I) *Practice at Hearing.*[4]

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[1] By the 83d sect. of 9 & 10 Vic. c. 95, it is provided, "that on the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons, may be examined, either on behalf of the plaintiff or defendant, upon oath, or solemn affirmation in those cases in which persons are by law allowed to make affirmation instead of taking an oath, to be administered by the proper officer of the court."

But this is no longer restricted to the county courts. *See post*, Witness.

[2] Rule 86. "No attorney shall be allowed to appear for any person in a county court until he has signed a roll or book, to be kept by the registrar for that purpose, but no fee shall be payable for that purpose, and he shall once in every year, if required by the registrar, produce his certificate for the year to the registrar, who shall note the fact on the roll."

R. 87. "It shall not be necessary for either party, previous to the hearing, to give notice to the other, or to the court, of his intention to employ a barrister or attorney to act as his advocate at the hearing, and the allowance of costs for such barrister or attorney shall not be affected by such want of notice."

R. 88. "The provisions of 15 & 16 Vic. c. 54, s. 10, as to the persons who shall be allowed to appear for any party in any proceeding in the county courts, shall apply to all proceedings in insolvency and for protection, and to all other matters which may come before the court."

[3] *Consent that Court shall decide in an Action where Title has incidentally come in question.*

In the County Court of holden at
Between A. B. plaintiff,
and
C. D. defendant.

We, [*or*, the respective attornies of] the plaintiff and defendant, do hereby, under the provision of sect. 25 of 19 & 20 Vic. c. 108, consent that this action shall be decided by the judge of this court.

Given under our hands this day of 186

Plaintiff [*or* attornies].
Defendant [*or* attornies].

[4] It has been held that a plaintiff in the county court is not bound to anticipate by evidence affirmative matter of defence, but that he may prove his case, and is entitled to call witnesses in reply to the affirmative matter of defence established by the de-

(J) *Cause may be referred to Arbitration.* *See ante*, p. 370.

(*a*) *Order of Reference.*[1]

V. Of a New Trial.

The judge has authority to order a new trial.[2]

9 & 10 Vic. c. 95, s. 89, enacts, "that every order and judgment of any court holden under this act, except as herein provided, shall be final and conclusive between the parties, but the judge shall have power to nonsuit the

fendant. In the case in which it was so held, the claimant on the trial of an interpleader summons in the county court proved his title by the production of a deed, by which the execution-debtor assigned to him the goods taken in execution. The defendant having cross-examined a witness of the plaintiff, with a view to show that the deed was fraudulent, at the close of the plaintiff's case called witnesses for the purpose of establishing a case of fraud. The plaintiff proposed to call witnesses to rebut this evidence; but the judge refused to allow him to do so, being of opinion that such evidence ought to have been adduced in the first instance, seeing the defence had been indicated by the cross-examination. The Court of Exchequer held that the plaintiff was entitled to reserve the evidence negativing fraud, and adduce it by way of reply; and on this ground ordered a new trial. *Shaw v. Beck*, 2 Cox & Mac. 17 J. P. 72; 20 L. T. 211.

[1] *Order of Reference.*

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

By consent of the plaintiff and defendant it is, at a court holden this day, ordered, that all matters in difference in this cause [and all other matters within the jurisdiction of this court, in difference between the said parties] be referred to of whose certificate, to be made or given on or before the day of 18 shall be entered as the judgment in this cause. And it is further ordered, that the time for making or giving such certificate may be from time to time enlarged by the judge of the court, in his discretion, for such time as he shall, by indorsement to be by him made on this order, direct; and that the said certificate, when made or given, may be referred back again to the said arbitrator, at the like discretion of the said judge, without the further consent of the said parties; and in case the said parties shall neglect or refuse to attend any appointment to be made by the said arbitrator for proceeding under this order, after two days' notice thereof in writing shall have been given to him, by serving the same personally, or by leaving it at his last or usual place of abode, the said arbitrator shall be at liberty to proceed *ex-parte* in the matters of the said reference; and his certificate shall be as valid as if both the said parties had duly attended before him. And it is further ordered, that the costs of the said reference shall be in the discretion of the arbitrator, and that the costs of the action shall abide the event. And it is last ordered, that the submission to arbitration shall not be revocable by either party.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

[2] Rule 128. "An application for a new trial, or to set aside proceedings, may be made and determined on the day of hearing, if both parties be present, or such application may be made at the first court holden next after the expiration of twelve clear days from such day of hearing: Provided the intended applicant do, seven clear days before the holding of such court, deliver to the registrar at his office, and also give to the opposite party, by serving the same personally on such party, or by leaving the same at his place of abode or place of business, a notice in writing, signed by himself or his attorney or agent, stating that such application is intended to be made at such court, and setting forth shortly the grounds of such intended application: but such notice shall not operate as a stay of proceedings, unless the judge shall otherwise order. And if any money paid into court under any execution or order in the suit shall not have been paid out when such notice in writing shall be given to the registrar, the registrar shall retain the same to abide the event of such application, or until the judge shall otherwise order; and if no such application be made the money shall, if required, be paid over to the party in whose favour the order was made, unless the judge shall otherwise order; and if such notice be not given in manner aforesaid, or such application be not made at the court mentioned in the notice, no application for a new trial, or to set aside proceedings, shall be subsequently made, unless by leave of the judge, and on such terms as he shall think fit: Provided that this rule shall not apply to cases falling within the provision of sect. 80 of 9 & 10 Vic. c. 95."

R. 129. "The judge may, in his discretion, make it a condition of granting a new trial, that it shall take place before a jury, although the former trial did not take place before a jury."

If the judge hear an application for a new trial and refuse to grant one, he has

plaintiff in every case in which satisfactory proof shall not be given to him, entitling either the plaintiff or the defendant to the judgment of the court; and shall also, in every case whatever, have the power, if he shall think fit, to order a new trial to be had, upon such terms as he shall think reasonable, and in the mean time to stay the proceedings."

VI. Of the Judgment.

(A) *Judgment Debt not exceeding 20l. may be ordered to be paid by Instalments.*

Judgment debt not exceeding 20*l.* may be ordered to be paid by instalments.[1]

By 19 & 20 Vic. c. 108, s. 45, "where judgment has been obtained in a county court for a sum not exceeding twenty pounds, exclusive of costs, the judge may order such sum and the costs to be paid at such time or times, and by such instalments, if any, as he shall think fit, and all such monies shall be paid into court; but in all other cases he shall order the full amount for which judgment has been obtained to be paid either forthwith, or within fourteen clear days from the date of the judgment, unless the plaintiff, or his counsel, attorney, or agent, will consent that the same shall be paid by instalments; in which case the judge shall order the same to be paid at such time or times, and by such instalments, if any, as shall be consented to; and all such monies, whether payable in one sum or by instalments, shall be paid into court."

(*a*) *Form of Judgment for Plaintiff.*[2]

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no power to entertain another application. *Mossop v. The Great Northern Railway Co.* 25 L. J. C. P. 22.

[1] An order in the alternative to pay at a future time, or to be imprisoned, is bad. *Dews v. Ryley*, 11 C. B. 434; 20 L. J C. P. 264. *See post*, Judgment Summons.

Rule 110. "When an order is made for the payment of any sum of money by instalments, such instalments shall be payable at such periods as the judge shall order; and if no period be mentioned, the first shall become due on the twenty-eighth day from the day of making the order, and every successive instalment shall become due at a like period of twenty-eight days from the day of the previous instalments becoming due; and such instalments shall be paid into court in accordance with sect. 45 of 19 & 20 Vic. c. 108."

R. 111. "When an order is made for payment by instalments or otherwise, the registrar shall give notice to the plaintiff by post, in the form set forth in the schedule, of every payment made: Provided that such notice shall not be given where the instalment does not exceed ten shillings."

Notice to Plaintiff of Payment of Instalment.

No.
In the County Court of holden at
[*Seal.*]

I hereby give you notice that A. B. the defendant, has paid into court the sum of under the judgment obtained by you against him.

Dated this day of 18

Registrar of the Court.

To the Plaintiff.

N.B.—Upon your applying for the above amount it will be necessary that you should produce the plaint note given to you on the entry of the plaint.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] *Judgment for Plaintiff.*

No.
In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Acknowledgments of payment.

£	s.	d.

It is this day adjudged, That the plaintiff do recover against the defendant the sum of £ for debt [*or* damages], and for costs amounting to the sum of £ And it is ordered, that the defendant do pay the same to the registrar of the court on the day of [*or* by instalments of for every days, the first instalment to be paid on the day of 18

[In case default be made in payment of any one of such instalments, and execution issue, it shall be for the whole of the above amount then remaining due.]

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

(*b*) *Form of Judgment against Defendant for Payment of Costs.*[1]

(*c*) *Judgment for Delivery of Goods in an Action by Purchaser against Vendor.*[2]

(B) *Judgment need not be served.*[3]

[*This form will, by striking out the words in brackets, or the words* on the day of *in line* 11, *apply to judgment of payment, whether for payment forthwith of the whole claim or by instalments, and to judgments under* 13 *&* 14 *Vic. c.* 61, *s.* 9, *and also to judgments in replevin, where the judgment is for the plaintiff.*]

[1] *Judgment against Defendant for Payment of Costs.*

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing the plaintiff's application at a court holden this day, it is adjudged, That the plaintiff do recover against the defendant the sum of £ for costs incurred by the plaintiff in preparing for trial [*or* in attending court] before the notice of payment of money into court was received by him, such money having been so paid in less than five clear days before the return day of the summons.

And it is ordered, That the defendant do pay the same to the registrar of this court on the day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] *Order under* 19 *&* 20 *Vic. c.* 97, *s.* 2.

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause (the same being for breach of contract to deliver specific goods for a price in money) at a court holden this day, it being adjudged that the plaintiff is entitled to recover, it is, upon the application of the plaintiff, found and adjudged that the goods, in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered, are as follows; that is to say [*here enumerate the goods undelivered*], and that the plaintiff would have been liable to pay the sum of £ [*here insert the sum to be paid by plaintiff for the delivery thereof*]; that the plaintiff will have sustained damages to the amount of £ [*here insert the sum assessed for damages in the event of the non-delivery of the goods*] if the said goods shall not be so delivered; and thereupon judgment being now given for the plaintiff, it is, upon the application of the plaintiff, ordered, That the said goods be delivered by defendant to the plaintiff, on the payment by him of the said sum of £ [*here insert the sum to be paid by plaintiff for the delivery*] on or before the day of now next ensuing, and in default thereof execution do issue for the delivery to the plaintiff of payment by plaintiff of the sum of £ [*here insert the sum to be paid by plaintiff for the delivery*] of the said goods; and that the defendant shall not have the option of retaining the same upon payment of the damages lastly assessed in the event of the non-delivery of the goods; and that the plaintiff do recover against the defendant the said sum of £ [*here insert the sum assessed for damages if the goods be delivered*], for damages, and £ for costs. And it is further ordered, That if the said goods, or any part thereof, cannot be found within the district of this court, the bailiff of this court shall distrain the defendant by all his lands and chattels within the district of this court, till the defendant deliver the said goods; or, at the option of the plaintiff, the said bailiff shall cause to be made of the defendant's goods the said sum secondly above assessed for damages, or a due proportion thereof.

[3] It is not necessary that the order for payment, which is the judgment, should be served, as the parties are bound to take notice of it. *Ely v. Moule*, 5 Ex. 918; 20 L. J. Ex. 29. *Robinson v. Gell*, 12 C. B. 191; 21 L. J. C. P. 155. "Here," said *Parke, B.*, in a case in which the question was raised, "the judgment of the court is that the plaintiff recover his debt, with costs; and an order is made for payment thereof forthwith. Then, if the party who is presumed to be present (for his not appearing is equivalent to it) does not pay, he is liable to have his goods taken in execution. It is said, however, that the judges, by the rules which they have framed, have considered that judgments and orders are to be served. But those rules are not a judicial exposition of the statute, for they were not made in open court after hearing argument on both sides, although no doubt they would lead us to consider the statute well before coming to a decision. The rule referred to supposes that there are cases in which orders are to be served, and also in which judgments are to be served. With respect to orders of the judge of the county court, after judgment pronounced in open court,

(C) *Proceedings on a Judgment more than Six Years Old.*[1]

VII. Of the Costs.

(A) *Costs abide the event in the Absence of any Direction.*

Costs abide the event of the action, if no direction is given.

9 & 10 Vic. c. 95, s. 88, enacts, "that all the costs of any action or proceeding in the court, not herein otherwise provided for, shall be paid by, or apportioned between the parties, in such manner as the judge shall think fit, and in default of any special direction shall abide the event of the action, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court."

(B) *Fees of Barristers and Attornies.*

(*a*) *In Actions for Claims not exceeding 20l.*

An attorney is not entitled to a fee, unless the claim exceed 5*l.*[2]

9 & 10 Vic. c. 95, s. 91, enacts, "that no person not being an attorney admitted to one of her Majesty's superior courts of record, shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court; and no attorney shall be entitled to have or recover therefore any sum of money, unless the debt or damage claimed shall be more than five pounds, or more than fifteen shillings, in any case within the summary jurisdiction given by this act; and in no case shall any fee exceeding one pound three shillings and sixpence be allowed for employing a barrister as counsel in the cause; and the expense of employing a barrister or an attorney, either by the plaintiff or defendant, shall not be allowed on taxation of costs, in the case of a plaintiff where less than five pounds is recovered, or in the case of a defendant where less than five pounds is claimed, or in any case, unless by order of the judge."

And in actions not exceeding 20*l.* the attorney's claim for costs limited

19 & 20 Vic. c. 108, s. 36, enacts, "where in any action the debt or damage claimed shall not exceed twenty pounds, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in the ninety-first section of the act of the ninth and tenth

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subsequently varied by him, would be like a rule of a superior court, and must be served. I have looked in vain for a case where the act requires service of a judgment." *Ely v. Moule*, *supra*.

R. 108. "Orders for payment of money or costs, or both, and orders of adjournment, when directed to be served, shall in all cases be prepared by the registrar of the home court, and delivered to the bailiff, who shall send them by post or otherwise to the parties on whom they are respectively directed to be served: Provided always, that it shall not be necessary for the party in whose favour any order has been made to prove previously to his taking proceedings thereon that it was posted or reached the opposite party."

There is a registry of every judgment entered in the county court for ten pounds and upwards. 15 & 16 Vic. c. 54, s. 18.

The entries of the registrar in the book kept by him, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar, are admissible in all courts and places as evidence of such entries, and of the proceedings referred to thereby, and of the regularity of such proceedings, without further proof. 9 & 10 Vic. c. 95, s. 111.

The entry of judgment in the book of the court made by the registrar, or a copy thereof, is conclusive evidence of the facts stated, and cannot be contradicted by the evidence of the judge of the court. *Dews v. Ryley*, 11 C. B. 434; 20 L. J. C. P. 264.

"For every judgment where the defendant shall have, either personally or by his attorney or agent, admitted the claim, the same fee shall be taken as on a judgment, by consent, under the 13 & 14 Vic. c. 61, s. 8 or 9, whether he applies for time to pay or not." Table of 21st November, 1856.

[1] By rule 112, "no warrant against the goods, or judgment summons, shall, without leave of the judge, issue on a judgment more than six years old, unless some payment has been made into court under such judgment within twelve months previously; but no notice to the defendant, previous to applying for such leave, shall be necessary, and such leave shall be expressed on the warrant or summons under the seal of the court."

[2] It admits of doubt whether the expense of employing a barrister or attorney can be allowed where the debt or damage claimed is under 5*l.*, but together with the costs claimed is above that amount. *Lawford v. Partridge*, 1 H. & N. 621; 26 L. J. Ex. 147.

to those mentioned in s. 91, unless the client has agreed to pay more.

years of the reign of her present Majesty, chapter ninety-five, unless upon taxation of costs the registrar be satisfied, by writing under the hand of the client, that he has agreed to pay further costs or charges; and in such case the registrar may allow any costs or charges not exceeding the amount which may have been so agreed to be paid."

(*b*) *Where the Claim exceeds 20l.*[1]

(C) *Table of Costs and Charges.*[2]

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[1] A scale of costs in actions exceeding 20*l.* has been framed by the committee of five county-court judges, and approved by the Lord Chancellor. 19 & 20 Vic. c. 108, s. 33.

[2] The following is the table of Costs and Charges to be paid to counsel and attornies in the county courts, as well between party and party as between attorney and client, under the provisions of the statute 19 & 20 Vic. c. 108:—

	£	*s.*	*d.*
Letter before suit	0	3	0
Instructions to sue or defend	0	5	0
Attendance and entering plaint, including particulars of demand and copies, each particulars and copies being signed by the attorney N.B.—The total amount of these items to be entered on the summons.	0	10	0
Examining and taking minutes of the evidence of each witness afterwards allowed by the judge	0	3	0
Attending court and conducting cause where no counsel employed	0	10	0
Witnesses' expenses in conformity with rule	0	3	0
Attending taxing costs			

Occasional Costs.

Attending to apply for summons out of the district N.B.—The amount of this item to be entered on the summons.	0	4	0
If plaintiff abandon action and give notice thereof, attending settling	0	3	0
Notice to produce,—notice to admit,—notice of application for a new trial or to set aside proceedings, including copies or duplicate originals and service, and notice of special defence and copies, including particulars and copies in cases of set-off, and attending registrar of the court therewith, such notices, particulars, and copies being signed by the attorney	0	5	0
Attending inspecting documents	0	5	0
Mileage one way from the attorney's place of business to place of inspection of documents, for each mile, not exceeding in the whole twenty miles	0	0	6
Preparing confession or statement of agreement under sect. 8 or 9 of the 13 & 14 Vic. c. 61, where prepared by the plaintiff's attorney, including all incidental attendances	0	7	0
All necessary affidavits, including filing each oath, sum paid	0	5	0
Attending to enter up judgment by default	0	3	0
Attending court for an order to bring up a prisoner to give evidence	0	4	0
Instructions for and drawing and copying brief in cases in which counsel employed, including attendance on counsel therewith	2	0	0
Fee to counsel and clerk; sum paid, not exceeding	3	5	6
Attending court on trial with counsel	0	3	0
Attending court to support or oppose motion for new trial, or motion to set aside proceedings, or motion for a change of venue, including instructions or any other necessary attendance, where no counsel employed	0	15	0
Attending on the last-mentioned cases with counsel	0	10	0
Fee to counsel and clerk	1	3	6
Any attendance at the office of the registrar which he may on taxation think was necessary	0	3	0
Every bond given under sect. 70 of 19 & 20 Vic. c. 108	0	7	0

New Trial.

Costs to be allowed on the same scale as on the original trial.

Costs of the Day on Adjournment of Cause.

Attorney for attending court where no counsel employed	0	15	0
Attending with counsel	0	10	0
Refresher fee to counsel and clerk	1	3	6
Witnesses' expenses same as on trial.			

(D) *Taxation of Costs.*

(*a*) *Between Party and Party.*

By the 19 & 20 Vic. c. 108, s. 34, with respect to proceedings in the county courts in actions where the debt or damages claimed exceeds 20*l.*, "all costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred; but his taxation may be reviewed by the judge of the court on the application of either party; and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force."

Costs as between party and party, where the claim exceeds 20*l.*, are taxed by the registrar.[1]

Arbitration.

	£	*s.*	*d.*
Attending reference without counsel, for each sitting	1	0	0
Attending reference with counsel, for each sitting	0	15	0
Fee to counsel and clerk for each sitting, sum paid not exceeding	2	4	6

Witnesses' expenses same as on trial.

Note. — Costs of counsel and attorney, or of an attorney, on attending reference, shall not be allowed without the order of the judge; nor shall the costs of more than one sitting be allowed without the order of the judge.

Costs in actions under 19 & 20 Vic. c. 108, s. 23, shall be taxed according to the scale of taxation used in the Court of Queen's Bench, so far as it is directly applicable; and where it is not so applicable, the principle of that scale shall be followed.

Costs on Appeal.

Preparing notice of appeal, including copies and service	0	5	0
Paying money into court as deposit on appeal, including notice and service thereof	0	3	0
Notice of nature and particulars of proposed security, including copies and service	0	3	0
Notice of court to which appeal to be made	0	3	0
Preparing case, including copies	0	10	0
Attending judge to sign, or to settle and sign case	0	3	0
Transmitting copies of case, including depositing the same	0	3	0
Transmitting case and copies, including notice and service thereof	0	3	0
Applications to judge for leave to proceed in the judgment	0	5	0
Depositing order of court of appeal, including notice and service thereof	0	3	0

Where a new trial takes place in pursuance of the direction of the court of appeal the costs of such new trial shall be allowed on the same scale as in the case of a new trial granted by the judge of the county court.

N.B. — The costs in every cause shall, upon the above scale, abide the event, unless the judge shall make some special order with reference to such costs, or any part thereof.

Certified to the Lord Chancellor, &c.

Allowance to Witnesses.

(County Court Rules, 1857.)

Gentlemen, merchants, bankers, and professional men, per diem, from	10*s.*	to	1	0	0
Tradesmen, auctioneers, accountants' clerks, and yeomen, per diem	„	5	„	0	10	0
Artizans and journeymen, per diem	„	3	„	0	5	0
Labourers and the like, per diem	„	2	„	0	3	0

Travelling expenses, sum reasonably paid, but not more than sixpence per mile one way.

If the witnesses attend in more than one cause, they will be entitled to a proportionate part in each cause only.

The following are the Fees Payable for Subpœna to Witnesses.

(Additional Table of 21st November, 1856.)

For every subpœna to be served in a home district, if served within two miles of court-house	0	1	0
For every mile beyond two	0	0	6

But the total fee to be taken is in no case to exceed 3*s.*

For every subpœna to be served in a foreign district	0	3	0

[1] By rule 101, "the judge shall in each case direct what number of witnesses are to be allowed on taxation of costs between party and party, and their allowance for attendance shall in no case exceed the highest rate of the allowance mentioned in the scale in the schedule."

R. 102. "The costs of witnesses, whether

(*b*) *Between Attorney and Client.*

Costs between attorney and client, in actions where the claim exceeds 20*l.*, may be taxed by the registrar.

By the 19 & 20 Vic. c. 108, s. 35, with respect to such proceedings as are last hereinbefore specified, "all costs and charges between attorney and client shall, on the application either of the attorney or client, but not otherwise, be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge of the court, on the application of either party; and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no attorney shall have a right to recover from his client any costs or charges in respect of such proceedings, unless they shall have been allowed, either on such taxation, or on the taxation of a master of a superior court of common law or of the Court of Chancery."

VIII. Of Execution against Goods.

(A) *Court may award Execution against Goods.*

Court may award execution against goods.[1]

The 9 & 10 Vic. c. 95, s. 94, enacts, "that whenever the judge shall have made an order for the payment of money, the amount shall be recoverable, in case of default or failure of payment thereof, forthwith, or at the time or times and in the manner thereby directed, by execution against the goods and chattels

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they have been examined or not, may, in the discretion of the judge, be allowed, though they have not been summoned."

R. 103. "Money paid into court on a judgment shall be appropriated first in satisfaction of the costs, and afterwards in satisfaction of the original demand."

R. 104. "Costs of warrants against the goods, whether executed or unexecuted, or unproductive, shall be allowed against the defendant, unless the judge shall otherwise direct."

R. 105. "Costs of warrants of commitment, whether executed or unexecuted, shall be allowed against the defendant, unless the judge shall otherwise direct."

[1] By 9 & 10 Vic. c. 95, s. 93, "if there shall be cross-judgments between the parties, execution shall be taken out by that party only who shall have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller; and satisfaction for the remainder shall be entered, as well as satisfaction on the judgment for the smaller sum; and if both sums shall be equal, satisfaction shall be entered upon both judgments."

The registrar is bound, upon the application of a party who has obtained judgment, to issue execution according to the terms of the order for payment. In case of his refusal, a *mandamus* will lie to compel him to do so; but before resorting to this remedy application ought to be made to the judge of the county court to order the registrar to issue execution. *Ex-parte Overseers of Christchurch*, 2 Pr. Rep. 660. If both refuse to interfere, the *mandamus* ought to be directed to the registrar. *Reg. v. Fletcher*, 2 E. & B. 279; 21 L. J. Q. B. 310.

"The precise time when any application shall be made to a registrar to issue a warrant against the goods of a party shall be entered by him in the execution-book and on the warrant; and when more than one such warrant shall be delivered to the high-bailiff to be executed, he shall execute them in the order of the times so entered." 19 & 20 Vic. c. 108, s. 46.

By the 109th sect. of 9 & 10 Vic. c. 95, "in or upon every warrant of execution issued against the goods and chattels of any person whomsoever, the clerk of the court shall cause to be inserted or indorsed the sum of money and costs adjudged, with the sums allowed by this act as increased costs, for the execution of such warrant; and if the party against whom such execution shall be issued shall, before an actual sale of the goods and chattels, pay, or cause to be paid or tendered, unto the clerk of the court out of which such warrant of execution has issued, or to the bailiff holding the warrant of execution, such sum of money and costs as aforesaid, or such part thereof as the person entitled thereto shall agree to accept in full of his debt, or damages and costs, together with the fees herein directed to be paid, the execution shall be superseded, and the goods and chattels of the said party shall be discharged and set at liberty."

By rule 113, "warrants of execution against the goods shall bear date on the day on which they are issued, and shall continue in force for twelve calendar months from such dates, and no longer."

The meaning of the 113th rule is, that the warrant must be executed within twelve calendar months of its date; and if the goods or the person of the debtor have been taken within that time, the rule is complied with, notwithstanding the goods are sold or the person detained after that time. *Hayes v. Keene*, 12 C. & B. 233; 16 Jur. 976.

of the party against whom such order shall be made; and the clerk of the said court, at the request of the party prosecuting such order, shall issue under the seal of the court a writ of *fieri facias*, as a warrant of execution, to the high-bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied, by distress and sale of the goods and chattels of such party, such sum of money as shall be ordered, wheresoever they may be found within the district of the court, whether within liberties or without, and also the costs of the execution; and all constables and other peace-officers within their several jurisdictions shall aid in the execution of every such warrant."

R. 114. "Where a defendant has made default in payment of the whole amount awarded by the judgment, or of an instalment thereof, a warrant of execution, without leave of the court, may issue against his goods; and such execution shall be for the whole amount of the judgment and costs then remaining unsatisfied, unless in the case of instalments the judge shall otherwise direct at the time of giving judgment."

R. 115. "The registrar shall, on issuing a warrant of execution against the goods, indorse on such warrant the amount to be levied, distinguishing the amount adjudged to be paid and the amount of the fee for issuing the warrant, and shall prepare and deliver to the bailiff, with the warrant, a notice in the form contained in the schedule: and the bailiff, upon levying, shall deliver such notice to the party against whom the execution has issued, or leave the same at the place where the execution is levied."

R. 116. "Warrants of execution against the goods may be issued concurrently into one or more districts, provided that the costs of more than one warrant shall not be allowed against the execution debtor, unless by order of the judge."

By s. 95 of 9 & 10 Vic. c. 95, "if the judge shall have made any order for payment of any sum of money by instalments, execution upon such order shall not issue against the party until after default in payment of some instalment according to such order, and execution or successive executions may then issue for the whole of the said sum of money and costs then remaining unpaid, or for such portion thereof as the judge shall order, either at the time of making the original order, or at any subsequent time, under the seal of the court."

By 19 & 20 Vic. c. 108, s. 47, "when a writ against the goods of a party has issued from a superior court, and a warrant against the goods of the same party has issued from a county court, the right to the goods seized shall be determined by the priority of the time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the issue of the warrant to be executed; and the sheriff on demand shall, by writing signed by any clerk in the office of the under-sheriff, inform the high-bailiff of the precise time of such delivery of the writ, and the bailiff, on demand, shall show his warrant to any sheriff's officer; and such writing purporting to be so signed, and the indorsement on the warrant, shall respectively be sufficient justification to any high-bailiff or sheriff acting thereon."

By s. 108 of 9 & 10 Vic. c. 95, "no judgment or execution shall be stayed, delayed, or reversed, upon or by any writ of error or *supersedeas* thereon, to be sued for the reversing of any judgment given in any court holden under the provisions of this act."

By s. 96 of 9 & 10 Vic. c. 95, "every bailiff or officer executing any process of execution issuing out of the said county court against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected from such seizure), and may also seize and take any money or bank-notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, belonging to any such person against whom any such execution shall have issued as aforesaid."

By s. 97 of the same act, "the high-bailiff shall hold any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money which shall have been so seized or taken as aforesaid, as a security or securities for the amount directed to be levied by such execution, or so much thereof as shall not have been otherwise levied or raised for the benefit of the plaintiff; and the plaintiff may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby, when the time of payment thereof shall have arrived."

By the 106th sect. of 9 & 10 Vic. c. 95, "no sale of any goods which shall be taken in execution as aforesaid shall be until after the end of five days at least next following the day on which such goods shall have been so taken, unless such goods be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and until such sale the goods shall be deposited by the bailiff in some fit place, or they may remain in the custody of a fit person approved by the high-bailiff, to be put in possession by the bailiff; and it shall be lawful for the high-bailiff, from time to time as he shall think proper, to appoint

(*a*) *Warrant of Execution against Goods of Defendant.*[1]

(*b*) ,, *against Goods of Plaintiff.*[2]

such and so many persons for keeping possession, and so many sworn brokers and appraisers for the purpose of selling or valuing any goods, chattels, or effects taken in execution under this act, as shall appear to him to be necessary, and to direct security to be taken from each of them for such sum and in such manner as he shall think fit, for the faithful performance of their duties without injury or oppression; and the judge or high-bailiff may dismiss any person, broker, or appraiser so appointed; and no goods taken in execution under this act shall be sold for the purpose of satisfying the warrant of execution except by one of the brokers or appraisers so appointed; and the brokers or appraisers so appointed shall be entitled to have, out of the produce of the goods so distrained or sold, sixpence in the pound on the value of the goods for the appraisement thereof, whether by one broker or more, over and above the stamp-duty; and for advertisements, catalogues, sale and commission and delivery of goods, one shilling in the pound on the net produce of the sale."

By rule 106, "no possession fee shall be payable where an execution is paid out at the time of the levy; but if the officer shall necessarily remain in possession more than half an hour, and the execution shall be paid out on the day of levy, the possession for that day shall be charged."

R. 107. "No appraisement is to be made until the fifth day of the bailiff's holding possession of the goods under an execution, unless where the goods are of a perishable nature, or are sold at the request of the party, before the expiration of four days, or unless the goods are removed."

[1] *Warrant of Execution against the Goods of Defendant.*

No. [*of Plaint*].
No. [*of Warrant*].

In the County Court of holden at
[*Seal.*] Between A. B. plaintiff,
and
C. D. defendant.

Whereas on the day of 18 the plaintiff obtained a judgment in this court against the defendant for the sum of £ for debt [*or* damages] and costs; and it was thereupon ordered by the court that the defendant should pay the same to the registrar on the day of [*or* by instalments of for every days]; and whereas default has been made in payment according to the said order: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found, within the district of this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds) the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank) and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Amount for which judgment was obtained			
Paid into court			
Remaining due			
Poundage for issuing this warrant			
Total amount to levied . . £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[*This Form will also apply to a warrant of execution upon a judgment under* 13 *&* 14 *Vic. c.* 61, *s.* 9; *and by leaving out the words "and whereas default has been made in payment according to the said order," to a warrant of execution under the Bills of Exchange Act.*]

[2] *Warrant of Execution against the Goods of Plaintiff.*

No. [*of Plaint*].
No. [*of Warrant*].

In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of 18 it was ordered by the court, that judgment should be entered for defendant [*or* that judgment of nonsuit be entered], and that the plaintiff should pay to the registrar of the court, on or before the day of the sum of for the defendant's costs of suit:

(*c*) *Form of Notice sent with Warrant.*[1]

(*d*) *Warrants of Execution where the Plaintiff in an Action for the Non-delivery of Goods has an Order for their Delivery.*[2]

And whereas default has been made in payment according to the said order: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the plaintiff, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the defendant under the said judgment, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the plaintiff, which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of the court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Costs adjudged			
Paid into court			
Remaining due			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said plaintiff.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[1] *Notice to be sent with all Warrants of Execution against the Goods.*

No. [*of Warrant*].

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

Take notice, That the warrant of execution against your goods on the judgment obtained against you in this action is for the following amount:—

	£	s.	d.
Amount for which judgment was obtained, since paid by you into court			
Remaining due on judgment . .			
Poundage for issuing this warrant			
Total amount to be levied £			

The costs of keeping possession of such of your goods as may be seized is *sixpence in the pound on the value of such goods.*

If you pay the amount to be levied within half-an-hour of the entry of the bailiff, you will not be required to pay to him any further sum than the amount directed to be levied as stated above.

Your goods are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at your request.

If your goods are sold, the following fees are chargeable for the appraisement and sale, and no others:—

For the *appraisement*, sixpence in the pound on the value of the goods appraised, over and above the stamp-duty.

For the sale, including advertisements, catalogues, sale and commission, and delivery of the goods, one shilling in the pound on the net produce of the sale.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] *Distringas and Warrant of Execution against the Defendant's Goods for the Amount of Damages for Non-delivery of the Goods (supposing the Goods delivered under the Order and Distringas) and Costs, under* 19 & 20 *Vic. c.* 97, *s.* 2.

No. [*of Plaint*].

No. [*of Warrant*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,

and

C. D. defendant.

Whereas at a court holden at on the day of 18 the plaintiff obtained a judgment against the defendant for the delivery to the plaintiff, upon payment by the plaintiff of the sum of £ [*here insert the sum to be paid by plaintiff for the delivery*] of the following goods, that is to say [*here enumerate the goods enumerated in the judgment*]; and by the said judgment it was found and adjudged that the plaintiff will have sustained damages to the amount of £ [*here insert the sum assessed for damages if the goods be delivered*], if the said

goods shall be delivered to the plaintiff under this warrant, and to the amount of £ [*here insert the sum assessed for damages in the event of the non-delivery of the goods*] if the said goods shall not be delivered; and judgment being then given for the plaintiff, it was thereupon ordered that execution do issue for the delivery to the plaintiff, on payment by the plaintiff of the sum of £ [*here insert the sum to be paid by plaintiff for the delivery of the said goods*]; and that the defendant should not have the option of retaining the said goods upon payment of the said sum of £ [*here insert the sum assessed for damages if the goods be delivered*], and that the plaintiff do recover against the defendant the said sum of £ for damages, and £ for costs.

And it was further ordered, that if the said goods, or any part thereof, should not be found within the district of this court, the bailiff of this court should distrain the defendant by all his lands and chattels within the district of this court, till the defendant deliver the said goods, or, at the option of the plaintiff, the said bailiff should cause to be made of the defendant's goods the said sum of £ [*here insert the sum found for damages if the goods be not delivered*], or a due proportion thereof: And whereas the said goods have not been delivered according to the said order, and the said sum of £ so payable by the plaintiff as aforesaid has been paid to the registrar of this court, and the plaintiff has not expressed his option to have the said sum of £ [*here insert the sum found for damages if the goods be not delivered*], or a due proportion thereof, made of the goods of the defendant: These are therefore to require and order you forthwith to seize the said goods so not delivered as aforesaid, wheresoever they may be found within the district of this court, and to deliver the same to the plaintiff, and to pay over to the defendant, upon seizure of the said goods, the said sum of £ [*here insert the sum to be paid by the plaintiff for the delivery*], which is delivered to you together with this warrant: And if the same cannot be found by you within such district, you are required and ordered to distrain all the lands and chattels of the defendant, wheresoever they may be found within the district of this court, and them hold, until the defendant shall deliver the same goods to you; and further, to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of the warrant, being the amount due to the plaintiff under the said order, including the costs of this execution, and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant, which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution hereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Amount for damages if the goods be delivered			
Sum adjudged for costs			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels seized for damages and costs are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

N.B. When a plaintiff sues out this warrant, he must pay to the registrar the amount found by the judgment to be payable by plaintiff for the delivery of the goods, and the registrar must hand over such amount to the bailiff with this warrant, for the bailiff to pay to defendant, if either the defendant delivers the goods to the bailiff, or the bailiff obtains possession of them under this warrant.

Warrant of Execution against Defendant's Goods under 19 & 20 *Vic. c.* 97, *s.* 2, *where Plaintiff exercises the Option of having the Damages assessed for the Non-delivery of Goods* (*where the Goods are not delivered pursuant to the Order*), *levied by Distress and Sale of Defendant's Goods.*

No. [*of Plaint*].

No. [*of Warrant*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas at the court holden at on the day of 18 the plaintiff obtained judgment against the defendant for the delivery to the plaintiff, upon payment by the plaintiff of the sum of £ [*here insert the sum to be paid by plaintiff for the delivery*] of the following goods, that is to say [*here enumerate the goods enumerated in the judgment*], and by the said judgment it was found and adjudged that the plaintiff will have sustained damages to the amount of £ [*here insert the sum assessed for damages if the goods be delivered*], if the said goods shall be delivered to the plaintiff under this warrant, and to the

(B) *Issuing Execution out of the Jurisdiction.*[1]

amount of £ [*here insert the sum assessed for damages in the event of the non-delivery of the goods*], if the said goods shall not be so delivered, and judgment being then given for the plaintiff, it was thereupon ordered that execution do issue for the delivery to the plaintiff, on payment by the plaintiff of the said sum of £ [*here insert the sum to be paid by plaintiff for the delivery*], of the said goods, and that the defendant should not have the option of retaining the said goods upon payment of the said sum of £ [*here insert the sum assessed for damages in the event of the non-delivery of the goods*], and that the plaintiff do recover against the defendant the said sum of £ [*here insert the sum assessed for damages if the goods be delivered*], for damages, and £ for costs: And it was further ordered, that if the said goods, or any part thereof, should not be found within the district of this court, the bailiff of this court should distrain the defendant by all his lands and chattels within the district of this court, till the defendant deliver the said goods; or, at the option of the plaintiff, the said bailiff should cause to be made of the defendant's goods the said sum of £ [*here insert the sum found for damages if the goods be not delivered*], or a due proportion thereof: And whereas the said goods have not been delivered according to the said order, and the plaintiff has expressed his option to have the said sum of £ [*here insert the sum assessed for damages in the event of non-delivery of the goods*] made of the goods and chattels of the defendant: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of him and his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Amount found for damages if the goods be not delivered . . .			
Sum adjudged for costs			
Poundage for issuing this warrant			
Total amount to be levied £			

[1] By 9 & 10 Vic. c. 95, s. 104, "in all cases where a warrant of execution shall have issued against the goods and chattels of any party, or an order for his commitment shall have been made under this act, and such party, or his goods and chattels, shall be out of the jurisdiction of the court, it shall be lawful for the high-bailiff of the court to send such warrant of execution or of commitment to the clerk of any other court constituted under this act, within the jurisdiction of which such party, or his goods and chattels, shall then be, or be believed to be, with a warrant thereto annexed, under the hand of the high-bailiff and seal of the court from which the original warrant issued, requiring execution of the same; and the clerk of the court to which the same shall be sent shall seal or stamp the same with the seal of his court, and issue the same to the high-bailiff of this court, and thereupon such last-mentioned high-bailiff shall be authorised and required to act in all respects as if the original warrant of execution or commitment had been directed to him by the court of which he is the high-bailiff, and shall, within such time as shall be specified in the Rules of Practice, return to the high-bailiff of the court from which the same originally issued what he shall have done in the execution of such process, and in case a levy shall have been made, shall, within such time as shall be specified in the Rules of Practice, pay over all monies received in pursuance of the warrant to the high-bailiff of the court from which the same shall have originally issued, retaining the fees for execution of the process; and where any order of commitment shall have been made, and the person apprehended, he shall be forthwith conveyed, in custody of the bailiff or officer apprehending him, to the gaol or house of correction, or other prison of the court within the jurisdiction of which he shall have been apprehended, and kept therein for the time mentioned in the warrant of commitment, unless sooner discharged under the provisions of this act; and all constables and other peace-officers shall be aiding and assisting within their respective districts in the execution of such warrant."

"In all cases where a warrant of execution shall have been issued against the goods and chattels of any person, or an order for his commitment been made, and such person, or his goods and chattels, shall be out of the jurisdiction of the court, and such warrant or order shall have sealed and stamped by the clerk of another county court, pursuant to 9 & 10 Vic. c. 95, s. 140,

(*a*) *High-Bailiff's Warrant to Registrar of Foreign Court.*[1]

(C) *Judge may suspend Execution.*[2]

(D) *Claim of Rent by Landlord.*

The landlord is entitled to certain arrears of rent in priority to the execution creditor.[3]

19 & 20 Vic. c. 108, s. 75. "Section one of the act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of a county court, but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal

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it shall be lawful for the said clerk of such other court to re-issue the said warrant or order to the high-bailiff of such said court, and thereupon such high-bailiff shall be authorised and required to act in all respects in the execution of the said warrant or order within the jurisdiction of the court to which the same shall have been so sent, in the same manner, with the same powers, and subject to the same rules, as if the district to which the warrant or order shall have been sent were within the limits of the court which originally issued the warrant or order." 15 & 16 Vic. c. 54, s. 5.

By rule 126, "in all cases of warrants, whether against the goods or the person, to be executed in a foreign district, the registrar of the foreign court shall, immediately on the receipt of the warrant, enter it in "The Foreign Executions Re-issued Book."

R. 127. "Where, by virtue of any warrant sent to a foreign district, any money shall have been received by the bailiff of the foreign court, such bailiff shall, within twenty-four hours from the receiving of such money, pay over the same to the registrar of the foreign court, and shall, unless an interpleader summons as to such money be pending, make a return in writing of the amount received; and in the case of a levy having been made, the bailiff shall state in the return the gross amount produced by such levy, the particulars of the appraiser's and broker's charges, and the fees allowed for keeping possession, and pay over to the registrar of the foreign court the amount levied, less such charges and fees, and the registrar of the foreign court shall certify in the said return the amount paid into court, and the correctness of the said charges, and shall account for and pay over such amount to the treasurer of his court, at such time as the treasurer shall require; and the high-bailiff shall thereupon transmit such return to the high bailiff of the home court, as directed by s. 104 of 9 & 10 Vic. c. 95; and such latter bailiff shall, within twenty-four hours from the receipt of such return, deliver the same to the registrar of his court, who shall thereupon pay out of any money in his hands, to the plaintiff in the cause, the amount certified in such return to have been received by the registrar of the foreign court as the proceeds of the execution, and shall enter in a book the amount so certified in the form set forth in the schedule, and the registrar of the home court shall file such return, and the registrar shall be allowed by the treasurer of his court, at his audit, the amount so paid."

[1] *High-Bailiff's Warrant to Registrar of Foreign Court.*

No. [*of Plaint*].
No. [*of Warrant*].
In the County Court of holden at
Between A. B. plaintiff,
and
C. D. defendant.

Whereas the warrant of execution [*or* commitment] hereunto annexed, has been issued out of this court against the goods and chattels of

And whereas the goods and chattels of are out of the ordinary jurisdiction of this court, and are [*or* is] believed to be within the jurisdiction of the county court of holden at of which you are the registrar: These are therefore to require you to cause the said warrant to be executed within the ordinary jurisdiction of the said last-mentioned county court.

Dated this day of 18
High-Bailiff of the County Court of holden at

To the Registrar of the County Court of holden at

[2] Sect. 105. "And be it enacted, that if it shall at any time appear to the satisfaction of the judge, by the oath or affirmation of any person, or otherwise, that any defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution given, made, or issued in such action, for such time and on such terms as the judge shall think fit, and so from time to time, until it shall appear by the like proof as aforesaid that such temporary cause of disability has ceased."

[3] Where the goods of a third party are taken in execution under county-court process, on the premises of the judgment debtor, and the owner claims his goods, the landlord is not entitled to be satisfied with arrears of rent out of the proceeds of such goods, or to insist that his rent shall be paid before their removal. *Foulgar v. Taylor*, 5 H. & N. 202; 29 L. J. Ex. 154. *Beard v.*

of the goods, by delivering to the bailiff or officer making the levy any writing, signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken, unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly the amount for which the warrant issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant; and the poundage of the high-bailiff and broker for keeping possession, appraisement, and sale under such distress, shall be the same as would have been payable if the distress had been an execution of the county court, and no other fees shall be demanded or taken in respect thereof."

(E) *Irregularity does not make the acting on Warrant a Trespass.*[1]

(F) *Removal of County-Court Judgment for the purpose of having Execution.*

Where the judgment is for a sum exceeding 20*l.* and no goods can be taken in execution under it.[2]

19 & 20 Vic. c. 108, s. 49, enacts, "if a judge of a superior court shall be satisfied that a party against whom judgment for an amount exceeding twenty pounds, exclusive of costs, has been obtained in a county court, has no goods or chattels which can be conveniently taken to satisfy such, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue to remove the judgment of the county court in one of the superior courts, and when removed, it shall have the same force and effect, and the same proceedings may be had thereon, as in the case of a judgment of such superior court; but no action shall be brought upon such judgment."

IX. Of the Judgment Summons.

(A) *The Summons.*

The judgment creditor may summon his debtor.[3]

9 & 10 Vic. c. 95, s. 98, enacts, "that it shall be lawful for any party who has obtained any unsatisfied judgment or order in any court held by virtue of this act, or under any act repealed by this act, for the payment of any debt, or damages or costs, to obtain a summons from any county court within the limits

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Knight, 8 E. & B. 865; 27 L. J. Q. B. 359.

The goods of a third party, improperly taken in execution on the defendant's premises under county-court process, are not distrainable under 19 & 20 Vic. c. 108, s. 75, that section applying only to goods of the execution debtor. *Beard v. Knight*, 6 W. R. Q. B. 226.

[1] No officer of a county court in executing any warrant of a county court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may have sustained by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs, unless the damages awarded shall exceed forty shillings. 19 & 20 Vic. c. 108, s. 60.

[2] No action can be brought in a superior court upon the judgment of a county court. (*Berkeley v. Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281; 17 Jur. 1153), but it may be pleaded in bar to an action for the same cause. *Austin v. Mills*, 9 Ex. 288; 23 L. J. Ex. 40.

[3] By R. 117, "a judgment summons may

of which any other party shall then dwell or carry on his business, such summons to be in such form as shall be directed by the rules made for regulating the practice of the county courts as herein provided, and to be served personally upon the person to whom it is directed, requiring him to appear at such time as shall be directed by the said rules to answer such things as are named in such summons; and if he shall appear in pursuance of such summons, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which is the subject of the action in which judgment has been obtained against him; and as to the means and expectation he then had, and as to the property and means he still hath of discharging the said debt, or damages, or liability, and as to the disposal he may have made of any property; and the person obtaining such summons as aforesaid, and all other witnesses whom the judge shall think requisite, may be examined upon oath touching the inquiries authorised to be made as aforesaid; and the costs of such summons, and of all proceedings thereon, shall be deemed costs in the cause."

(*a*) *Form of Judgment Summons.*[1]

issue at any time, without leave of the court, except in cases provided for either by sect. 48 of 19 & 20 Vic. c. 108, or by rule 112, and shall be forthwith delivered by the registrar to the bailiff, and shall be served personally, not less than five clear days before the day on which the party is required to appear to such summons, unless at the hearing the judge is satisfied, on evidence on oath before him, that such party was about to move from his dwelling or place of business, or was keeping out of the way to avoid service; in either of which cases service upon the party at any time before the time appointed for the appearance of such party shall be sufficient."

R. 118. "Upon the issue of a judgment summons against the party, the bailiff shall return into court any warrant of execution against the goods of such party which may have been issued upon a judgment on the case."

R. 119. "Where a judgment summons is heard in a court other than that in which judgment was obtained, and the order of such last-mentioned court is altered by the judge of the court in which the judgment summons is heard, all payments under such order shall be made into and execution thereupon against the goods shall be issued by the court which alters the order."

R. 120. "Where a certified copy of a judgment is obtained, the registrar shall make on the minute of the judgment a memorandum of having given such certificate; and no warrants of execution against the goods or judgment summons shall issue upon such judgment from the court in which the judgment was obtained, unless it be shown to the satisfaction of the court or registrar that no order has been made against the execution debtor in any other court."

"A judgment summons authorised by the 98th sect. of the act of the ninth and tenth years of the reign of her Majesty, c. 95, may by leave of the judge be obtained from the court in which judgment was obtained, although the judgment debtor shall not then dwell or carry on business within the district of such court, if the judge shall think fit, in the exercise of his discretion, to grant such leave." 19 & 20 Vic. c. 108, s. 48.

[1] "Any judgment summons issued out of a county court under sect. 98 of the act of the ninth and tenth years of the reign of her present Majesty, c. 95, or under this act, or any warrant of commitment in respect of an unsatisfied judgment or order of a county court, may respectively be in the form or to the effect given in schedule (B) to this act, numbered respectively (2) and (3); and all such summonses or warrants shall be deemed sufficient to justify proceedings under them without any further statement of facts to show jurisdiction." 19 & 20 Vic. c. 108, s. 61.

The following is the form of a

Summons for Commitment.

[Prescribed 19 & 20 Vic. c. 108, sch. B, No. 2].

In the [*title of court issuing summons*].

No. [*of Summons*].

No. [*of Judgment or Order*].

Between A. B. plaintiff,
and
C. D. defendant.

Whereas the plaintiff obtained a judgment [*or if no judgment has been obtained, or if a fresh order has been obtained upon a judgment, an order*] against you in the county court of on the day of 18 for the payment of £ for debt [*or* damages], and £ for costs, upon which judgment [*or* order], and the subsequent process issued thereon, the sum of £ is now due: You are therefore hereby summoned to appear personally in this court at [*place where court holden*] on the day of 18 at the hour of o'clock in the noon, to be examined by the court touching your estate and effects, and the circumstances under which you contracted the said debt [*or* in-

(B) *The Hearing of the Summons.*[1]

curred the said damages], and as to the means and expectation you then had, and as to the means you still have, of discharging the said debt [*or* damages], and as to the disposal you may have made of any property. And take notice, that if you disobey this summons the court may commit you to prison.

Dated this day of 18

Registrar of the Court.

Hours of attendance at the office of the registrar of this court [*place of office*] from ten till four.

When issued under this act, insert

"Issued by leave of the judge."

Warrant of Commitment.

In the [*title of court ordering committal*].

[*Seal.*]

No. [*of Commitment*].

No. [*of Judgment Summons*].

Between A. B. plaintiff,
and
C. D. defendant.

To the High-Bailiff and others the Bailiffs of the said court, and all peace officers within the jurisdiction of the said court, and to the Governor or Keeper of the [*prison used by the court*].

Whereas the plaintiff obtained a judgment [*or* order] against the defendant in the county court of on the day of 18 for the payment of £ for debt [*or* damages] and costs, upon which judgment [*or* order], and the subsequent process issued thereon, the sum of £ was at the date of the issuing of the summons hereinafter mentioned and still is due:

And whereas a summons was, at the instance of the plaintiff, duly issued out of this court, by which the defendant was required to appear at this court on the day of 18 to answer such questions as might be put to him pursuant to sect. 98 of the stat. 9 & 10 Vic. c. 95, in relation to such debt [*or* damages], which summons was proved to this court to have been personally and duly served on the defendant:

And whereas this court, at the hearing of the said summons, ordered that the defendant should be committed to prison for days, for [*as the case may be*] not appearing pursuant to such summons, or alleging a sufficient excuse for not so appearing;

[*or* for refusing to be sworn];

[*or* for refusing to answer such questions as aforesaid to the satisfaction of the judge];

[*or* for contracting the said debt under false pretences, *or* by means of fraud *or* breach of trust, *or* without reasonable expectation of being able to pay the same];

[*or* for making a gift or transfer of part of his property, with intent to defraud his creditors];

[*or* for having charged, *or* removed, *or* concealed part of his property with intent to defraud his creditors];

[*or* for not having satisfied the said judgment and costs, having had sufficient means and ability so to do]:

These are therefore to require you the said high-bailiff, bailiffs and others, to take the defendant, and to deliver him to the governor or keeper of the [*prison used by the court*], and you the said governor or keeper to receive the defendant, and him safely keep in the said prison for days from the arrest under this warrant, or until he shall be sooner discharged by due course of law.

Dated this [*insert date of order*] day of 18 E. F.

Registrar of the Court.

	£	s.	d.
Amount remaining due			
Poundage for issuing this warrant			
Total			

This warrant *remains in force one year* from the date thereof.

This form to be applicable to all judgments recovered at the hearing, or by default, or by consent, and to all orders within the jurisdiction of the court.

[1] By the 101st section of the 9 & 10 Vic. c. 95, "in every case where the defendant, in any suit brought in any county court, shall have been personally served with the summons to appear, or shall personally appear at the trial of the same, the judge at the hearing of the cause, or at any adjournment thereof, if judgment shall be given against the defendant, shall have the same power and authority of examining the defendant and the plaintiff and other parties touching the several things hereinbefore mentioned, and of committing the defendant to prison, and of making an order, as he might have and exercise under the provisions hereinbefore contained, in case the plaintiff had obtained a summons for that purpose after the judgment obtained as hereinbefore mentioned."

There is no appeal against the order of the judge on a judgment summons, the 13 & 14 Vic. c. 61, s. 14, having no application to these proceedings. *Rackham v. Blowers*, 15 Jur. 758.

Where the defendant was committed to prison for forty days on a warrant which recited that judgment had been recovered against him; that having personally appeared, and being present in court, he was examined as to the disposal of his property, and then the judge found that he had made a gift, transfer, or delivery of his property, with intent to defeat his creditors, and therefore committed him: the Court of Common Pleas held, upon an application for a writ of *habeas corpus*, that the case came within the 101st section of the 9 & 10 Vic. c. 95; and that the defendant being present at the hearing, and the examination taking place at that time, it was unnecessary to serve him with a summons under the 98th and 99th sections.

The judge may in certain cases commit the defendant to prison.

The 9 & 10 Vic. c. 95, s. 99, enacts, "that if the party so summoned shall not attend as required by such summons, and shall not allege a sufficient excuse for not attending, or shall, if attending, refuse to be sworn, or to disclose any of the things aforesaid, or if he shall not make answer touching the same to the satisfaction of such judge, or if it shall appear to such judge, either by the examination of the party or by any other evidence, that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors or any of them, or if it shall appear to the satisfaction of the judge of the said court that the party so summoned has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and if he shall refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered pursuant to the power hereinafter provided, it shall be lawful for such judge, if he shall think fit, to order that any such party may be committed to the common gaol or house of correction of the county, district, or place in which the party summoned is resident,[1] or to any prison which shall be provided as the prison of the court, for any period not exceeding forty days."

But the 22 & 23 Vic. c. 57, with a view to limit the power of imprisonment by judges of county courts, enacts, "that if a party summoned under and by virtue of the act 9 & 10 Vic. c. 95, s. 98, shall not attend as required by such summons, or allege a sufficient excuse for not attending, it shall not be lawful for the judge before whom such party shall have been so summoned to order that such party shall be committed to prison, unless it shall appear to the satisfaction of such judge that such party, if a defendant, in incurring the debt or liability which is the subject of the action in which judgment has been obtained, has obtained credit from the plaintiff under false pretences, or by means of fraud or breach of trust, or has wilfully contracted such debt or liability without

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And in the same case the court held, further, that the commitment was not to be construed with the same strictness as a conviction; and that it was not bad for alleging the offence in the alternative. *Ex-parte Purdy*, 9 C. B. 201; 19 L. J. C. P. 222.

An order for discharge granted by the Court for the Relief of Insolvent Debtors, comprising a judgment debt of the county court, took away from that county court the power of committing to prison a defendant by a warrant on a judgment summons. *Cookman v. Rose*, 5 W. R. 576; 29 L. T. Q. B. 123.

Previous to the 19 and 20 Vic. c. 108, the courts had held that a commitment on a judgment summons in such a case was good. *Abley v. Dale*, 11 C. B. 388. *Ex-parte Christie*, 4 E. & B. 714. *George v. Sumners*, 16 C. B. 532.

The 12 & 13 Vic. c. 101, s. 1, reciting that it is inexpedient that persons should be committed on judgment summonses to the house of correction, repeals the power of committal, in this respect, in the 9 & 10 Vic. c. 95, and substitutes the following enactment:—"It shall be lawful for any judge who would have been authorised under the said act to order any party or defendant to be committed as aforesaid for any such period as aforesaid, to order such party or defendant to be committed for the like period to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined for the county, city, borough, or place in which such party or defendant is resident, or to any other gaol or debtors' prison for the same county, city, borough, or place which shall, by any declaration of her Majesty's principal secretaries of state, be allowed as a place of imprisonment for persons committed under the said act." Where the debtors' prison is situated at an inconvenient distance, or is crowded, the Secretary of State may authorise commitment to the house of correction. 12 & 13 Vic. c. 101, s. 3.

[1] *See* also, as to the prison to which the debtor may now be committed, the 19 & 20 Vic. c. 108, s. 74.

having had at the same time a reasonable expectation of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any property, or shall have charged, removed, or concealed the same, with intent to defraud his creditors or any of them, or has then, or has had since the judgment obtained against him, sufficient means and ability to pay the debt or damages or costs so recovered against him, either altogether, or by any instalment or instalments which the court in which the judgment was obtained shall have ordered, and shall have refused or neglected to pay the same."

(C) *The Order.*

(*a*) *The Judge may Rescind or Alter previous Order.*[1]

The judge may rescind or alter the order.

The 9 & 10 Vic. c. 95, s. 100, enacts, "that it shall be lawful for the judge of any court before whom such summons shall be heard, if he think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendant so summoned before him for the payment, by instalments or otherwise, of any debt or damages recovered, and to make any further or other order, either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner as such judge may think reasonable and just."

(*b*) *Order to Rescind former Order.*[2]

(*c*) *Form of Order suspending Order of Judgment.*[3]

(*d*) *Order for Payment by Instalments.*[4]

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[1] If a fresh order is made the former order ought to be rescinded; but though this be not done, the amended order will operate as a stay of execution as to the former order. *Byrne v. Knipe*, 18 L. J. Q. B. 33.

[2] *Order to Rescind a former Order.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

It is ordered, That the order of this court in this action, bearing date the day of 18 be rescinded.

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

[3] *Order to Suspend Order of Judgment.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

It is ordered, That an order of this court in this action, bearing date the day of 18 be suspended until the day of 18

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

[4] *Order for Payment by Instalments on a Judgment Summons.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff.
and
C. D. defendant.

Acknowledgment of Payment into Court.

Date.	£	*s.*	*d.*	Received by

Whereas the plaintiff obtained a judgment of this court [*or* of the county court of holden at] against the defendant for the sum of £ for his debt [*or* damages] and costs, upon which judgment, and the subsequent process issued thereon, the sum of £ is still due:

And whereas a summons was, at the instance of the plaintiff, duly issued out of this court, by which the defendant was required to appear personally at this court this day to answer such questions as might be put to him, pursuant to sect. 98 of 9 & 10 Vic. c. 95, in relation to such debt [*or* damages]:

It is ordered, That the defendant do pay the amount still due on the said judgment, and the costs of the said summons and its hearing, as stated at the foot of this order, to the registrar of this court, by instalments of £ for every days; the first payment to be made on the day of 18

In case default be made in payment of any one of such instalments, and execution issue, it shall be for the whole of the above amount then remaining due.

(*e*) *The Warrant of Commitment.*[1] *See* Form, p. 395, n.

(D) *Imprisonment under the Judgment Order does not operate as Satisfaction of the Debt.*

9 & 10 Vic. c. 95, s. 103, enacts, "that no imprisonment under this act shall in anywise operate as a satisfaction or extinguishment of the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being anew summoned and imprisoned for any new fraud or other default, rendering him liable to be imprisoned under this act, or deprive the plaintiff of any right to take out execution against the goods and chattels of the defendant, in the same manner as if such imprisonment had not taken place." *See* 29 L. J. C. P. 135.

(E) *Upon Payment of what is due the Debtor is entitled to his Discharge.*

Upon payment of what is due the debtor is entitled to his discharge.[2]

9 & 10 Vic. c. 95, s. 110, enacts, "any person imprisoned under this act who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order, and all subsequent costs, shall be discharged out of custody, upon the certificate of such payment

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

	£	s.	d.
Amount remaining due			
Costs of judgment summons and its hearing			
£			

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] By 9 & 10 Vic. c. 95, s. 102, "whenever any order of commitment shall have been made as aforesaid, the clerk of the said court shall issue under the seal of the court a warrant of commitment, directed to one of the bailiffs of any county court, who, by such warrant, shall be empowered to take the body of the person against whom such order shall be made; and all constables and other peace-officers within their several jurisdictions shall aid in the execution of every such warrant; and the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order, shall be bound to receive and keep the defendant therein until discharged under the provisions of this act, or otherwise by due course of law." This section also provided "that no protection, order, or certificate, granted by any court of bankruptcy or for the relief of insolvent debtors, should be available to discharge any defendant from any commitment under such last-mentioned order." But now, by the 19 & 20 Vic. c. 108, s. 59, "every warrant of commitment which shall issue from a county court shall, on whatever day it may be issued, bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date, and no longer, but no order for commitment shall be drawn up or served."

Rule 121. "When a defendant does not dwell or carry on business in the district of the court to which he has been summoned to appear to a plaint, he shall not be liable at the hearing of such summons to be committed, under sec. 101 of 9 & 10 Vic. c. 95, whether he appears to such summons or not."

R. 122. "In cases of commitment under sections 99 or 101 of the 9 & 10 Vic. c. 95, the amount of the judgment, and all costs payable by the defendant, shall be indorsed on the warrant."

R. 125. "Warrants of commitment against the same party may be issued concurrently into one or more districts, provided that the costs of more than one warrant shall not be allowed against such party, unless by order of the judge."

The 59th sect. means, that the warrant shall remain in force for one year, and no longer, for the purpose of apprehension; and if a party be once apprehended within the year he may be kept in custody beyond that period. *Hayes v. Keene*, 12 C. B. 233; 21 L. J. C. P. 204.

The proper mode of obtaining the discharge of a privileged person is by application to the judge of the county court, or by writ of *habeas corpus* issuing from one of the superior courts. *Swann v. Dakins*, 16 C. B. 77; 24 L. J. C. P. 131.

Where the debtor enjoys the privilege of freedom from arrest under civil process issuing out of a superior court, he is equally protected from being subject to commitment under a judgment summons issuing out of a county court. The commitment is in the nature of an execution for debt, although the debt is not thereby satisfied. *Ex parte Dakins*, 16 C. B. 77; 24 L. J. C. P. 131. *Robson v. Doyle*, 25 L. T. Q. B. 115.

[2] By rule 123, "when a warrant of commitment for non-payment of money is is-

or satisfaction, signed by the clerk of the court, by leave of the judge of the court in which the order of imprisonment was made."

(*a*) *Form of Certificate for Discharge.*[1]

X. Of Actions in the County Courts by and against Persons Suing, or being Sued, in particular Rights or Capacities.

(A) *By and against Infants.*

(*a*) *Infants may Sue for Wages as if of full age.*

Infants may sue for wages as if of full age.

9 & 10 Vic. c. 95, s. 64. "And be it enacted, that it shall be lawful for any person under the age of twenty-one years to prosecute any suit in any court holden under this act for any sum of money not greater than twenty pounds, which may be due to him for wages or piece-work, or for work as a servant, in the same manner as if he were of full age."

(*b*) *But in an Action other than for Wages a next Friend must give Security for Costs.*[2]

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sued, the defendant may, at any time before his body is delivered into the custody of the gaoler, pay to the bailiff the total amount indorsed on the warrant, and on receiving such amount the bailiff shall discharge the defendant, and shall, within twenty-four hours after receiving such amount, pay over the same to the registrar."

And R. 124, directs, "in all cases of commitment for non-payment, it should be made part of the order of commitment that, on production of a certificate signed by the registrar, stating that payment or satisfaction of the sum, or of the instalment thereof, and costs, remaining due at the time of making the order for commitment, together with all subsequent costs, has been made, the defendant shall be discharged out of custody, without further leave of the judge."

Where the defendant having made default in paying the judgment debt, a judgment summons issued which he did not attend, and upon proof of its personal service upon him, the judge ordered him to be committed for seven days, or until he should be sooner discharged by due course of law. Under this order the registrar issued to the bailiff a warrant of commitment on which the amount of debt and costs was indorsed, and on which the defendant was arrested. Before his arrest, but after the issuing of the warrant, the defendant paid the debt and costs to the plaintiff, who wrote a letter to the registrar informing him of that fact. The defendant having brought an action of false imprisonment against the registrar's bailiff, it was held that the action could not be supported, as the order and warrant were regularly issued, and were in force at the time of the arrest, and were not superseded by the payment and the notice to the registrar. *Davis v. Fletcher*, 2 E. & B. 217; 22 L. J. Q. B. 429.

[1] *Certificate for the Discharge of a Defendant from Custody.*

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

I hereby certify that the defendant, who was committed to your custody by virtue of a warrant of commitment under the seal of this court, bearing date the day of 18 has paid and satisfied the sum of money for the non-payment whereof he was so committed, together with all costs due and payable by him in respect thereof; and that the defendant may, in respect of such warrant, be forthwith discharged out of your custody.

Given under the seal of the court this day of 18

By leave of the Judge of the Court,
Registrar of the Court.

To the Governor or Keeper of

Order for a New Trial.

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

It is ordered, That the judgment in this case, and all subsequent proceedings thereon, be set aside, and a new trial had between the parties on [*set out the terms or conditions, if any, on which the order is made*].

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

[2] By rule 5, "where an infant applies to enter a plaint for any cause of action other than for wages (or piece-work, or for work as a servant), he shall procure the attendance of a next friend at the office of the registrar at the time of entering the plaint, and no plaint shall be entered until the next friend has undertaken, in the form set forth in the schedule, to be responsible for costs, who, on entering into such undertaking, shall be liable in the manner, and to the same extent, as if he were a plaintiff in an ordinary suit; and the cause shall proceed in the name of the infant by such next friend, and the undertaking shall be filed by the registrar: but no order of the court shall be necessary for the appointment of such next friend. If the plaintiff

(c) And an Infant Defendant must appear by Guardian.[1]

(1) Form of Order appointing Guardian.[2]

(B) Plaints by and against Executors and Administrators.

(a) Executors and Administrators may Sue and be Sued.

Executors and administrators may sue and be sued.

9 & 10 Vic. c. 66. "And be it enacted, that it shall be lawful for any executor or administrator to sue and be sued in any court holden under this act, in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in any superior court."

(b) Proceedings by and against Executors and Administrators.[3]

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fail in or discontinue his suit, and do not pay the amount of costs awarded by the court to be paid by him to the defendant, proceedings may be taken for the recovery of such amount from the next friend, as for the recovery of any debt ordered to be paid by the court."

[1] R. 89. "Where any infant defendant appears at the hearing, and names a person willing to act as guardian, and who then assents so to act, such person shall be appointed guardian accordingly; but if the defendant do not name a guardian, the judge may appoint any person in court willing to become guardian, or in default of such person, the judge shall appoint the registrar of the court to be guardian, and the cause shall proceed thereupon as if another person had been appointed guardian, and the name of the guardian shall be entered in the form in the schedule, and no responsibility shall attach to the person so appointed guardian at the instance of the court."

Undertaking by Next Friend of Infant to be responsible for Defendant's Costs.

No.

In the County Court of holden at

I, the undersigned being the next friend of A. B., who is an infant and desirous of entering a plaint in this court against C. D. of &c., hereby undertake to be responsible for the costs of the said C. D. of &c., in such cause, and that if the said A. B. fail to pay to the said C. D., when and in such manner as the court shall order, all such costs of such cause as the court shall direct him to pay to the said C. D., I will forthwith pay the same to the registrar of the court.

Dated this day of 18

(Signed)

[2] *Order appointing Guardian named by Infant Defendant.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas now, at the hearing of this cause, the defendant being an infant, appears here in court, and names of to act as his guardian, who now assents to act as such guardian, I do therefore hereby appoint him to be the guardian of the defendant in this cause.

Given under the seal of the court, this day of 18

Judge of the Court.

Order appointing Guardian of Infant Defendant where Defendant does not name a Guardian.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas now, at the hearing of this cause, the defendant being an infant, appears here in court and does not name a guardian, I do therefore hereby appoint to be the guardian of the defendant in this cause.

Given under the seal of this court this day of 18

Judge of the Court.

[3] Rule 157. "In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the court shall otherwise order, be awarded in favour of the defendant, and shall be levied *de bonis propriis.*"

R. 158. "Where an executor or administrator, plaintiff or defendant, shall not appear on the day of hearing, the provisions of sects. 79 & 80 of 9 & 10 Vic. c. 95, and of sect. 10 of 13 & 14 Vic. c. 61, shall apply respectively, subject to the rules applicable to executors or administrators suing or sued."

R. 159. "A party suing an executor or administrator may charge in the summons that the defendant has had assets and has wasted them."

R. 160. "In all cases where the defendant is so charged in the summons, if the court shall be of opinion that the defendant has wasted the assets, the judgment shall be that the debt or damage or costs shall be levied *de bonis testatoris si, &c., et si non de bonis propriis;* and the non-payment of the amount of the demand immediately on the court finding such demand to be correct, and that the defendant is chargeable in respect of assets, shall be conclusive evidence of wasting to the amount with which he is so chargeable."

R. 161. "Where a defendant sued as an executor or administrator does not appear, or where the defendant denies his represent-

(*c*) *Forms of Judgment against Executors.*[1]

ative character, or alleges a release to himself of the demand, whether he insists on any other ground of defence or not, if the judgment of the court be in favour of the plaintiff, the judgment shall be that the amount found to be due and costs shall be levied *de bonis testatoris si*, &c., *et si non de bonis propriis*."

R. 162. "Where a defendant sued as an executor or administrator admits his representative character, and only denies the demand, if the plaintiff prove it, the judgment shall be that the demand and costs shall be levied *de bonis testatoris si*, &c., *et si non*, as to the costs, *de bonis propriis*."

R. 163. "Where such defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, and the defendant proves the administration alleged, the judgment shall be to levy the costs of proving the demand *de bonis testatoris si*, &c., *et si non de bonis propriis;* and as to the whole or residue of the demand, judgment of assets, *quando acciderint;* and the plaintiff shall pay the defendant's costs of proving the administration of assets."

R. 164. "Where such defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does not prove the administration alleged, the judgment shall be to levy the amount of the demand, if such amount of assets is shown to have come to the hands of the defendant, or such amount as is shown to have come to them and costs, *de bonis testatoris si*, &c., *et si non*, as to the costs, *de bonis propriis*, and as to the residue of the demand, if any, judgment of assets *quando acciderint*."

R. 165. "Where such defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall be for assets *quando acciderint*, and the plaintiff shall pay the defendant's costs of proving the administration of assets."

R. 166. "Where such defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, and has not established any other ground of defence, the judgment shall be to levy the amount of the demand, if so much assets are shown to have come to the hands of the defendant, or such amount as is shown to to have come to them, and costs *de bonis testatoris si*, &c., *et si non*, as to the costs, *de bonis propriis;* and as to the residue of the demand, if any judgment of assets, *quando acciderint*."

R. 167. "Where judgment has been given against an executor or administrator that the amount be levied upon assets of the deceased *quando acciderint*, the plaintiff or his personal representative may issue a summons in the form set forth in the schedule, and if it shall appear that assets have come to the hands of the executor or administrator since the judgment, the court may order that the debt, damages, and costs, be levied *de bonis testatoris si*, &c., *et si non*, as to the costs, *de bonis propriis*: Provided that it shall be competent for the party applying to charge in the summons that the executor or administrator has wasted the assets of the testator or intestate in the same manner as in rule 159. And the provision of rule 160 shall apply to such inquiry; and the court may, if it appear that the party charged has wasted the assets, direct a levy to be made as to the debt and costs, *de bonis testatoris si*, &c., *et si non de bonis propriis*."

R. 168. "Where a defendant admits his representative character and the plaintiff's demand, and that he is chargeable with any sum in respect of assets, he shall pay such sum into court, subject to the rules relating to payment into court in other cases."

R. 169. "In actions against executors or administrators, for which provision is not hereinbefore specially made, if the defendant fail as to any of the defences, the judgment shall be for the plaintiff as to his costs of disproving such defence, and such costs shall be levied *be bonis testatoris si*, &c., *et si non de bonis propriis*."

[1] *Judgment against an Executor who has wasted Assets.*

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,

and

C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs; and it is ordered that the defendant do pay the same to the registrar of this court on or before the day of

It is also adjudged that the defendant, being the executor [*or* administrator] of the said deceased, has made away with, wasted, and put to his own use, divers goods and chattels [*or* monies, *as the case may be*], to the amount of the said sum, which were the property of the said deceased, and which came to the hands of the defendant as executor [*or* administrator] aforesaid, to be administered.

Wherefore it is ordered, That if the defendant shall make default in the payment of the said sum, the same shall be levied by distress and sale of the goods and chattels which were of the said deceased, and which came to the hands of the defendant as executor [*or* administrator], if the de-

fendant has so much thereof in his hands to be administered; and if he has not, then that the said sums shall be levied of the proper goods and chattels of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against an Executor who has denied his Representative Character.

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,

and

C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs. And it is ordered that the defendant do pay the same to the registrar of this court on or before the day of 18

And the defendant having denied that he is executor [*or* administrator] of the said deceased, it appears to the court that he is executor [*or* administrator] of the said deceased.

Wherefore it is ordered, That if the defendant shall make default in the payment of the said sums, the same shall be levied by distress and the sale of the goods and chattels which were of the said deceased, and which came to the hands of the defendant as executor [*or* administrator], if the defendant has so much thereof in his hands to be administered; and if he has not, then that the said sums shall be levied of the proper goods and chattels of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against an Executor who has pleaded a Release of the Claim to himself.

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,

and

C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs. And it is ordered that the defendant pay the same to the registrar of this court on or before the day of 18

And the defendant having alleged that the plaintiff's claim had been released to him, it appears to the court that he has failed to prove such release.

Wherefore it is ordered, That if the defendant shall make default in the payment of the said sums, the same shall be levied by distress and sale of the goods and chattels which were of the said deceased, and which came to the hands of the defendant as executor [*or* administrator], if the defendant has so much thereof in his hands to be administered; and if he has not, then that the said sums shall be levied of the proper goods and chattels of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against Executor or Administrator who admits his Representative Character.

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,

and

C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs. And it is ordered that the defendant do pay the same to the registrar of this court on or before the day of 18

And the defendant having admitted his representative character, but denied the plaintiff's demand, and the plaintiff having proved the same, it is further ordered, that if the defendant shall make default in payment of the said sums, the same shall be levied as follows: The sum of £ [*the debt or damage and costs*], of the goods and chattels which were of the said deceased, and which came to the hands of the defendant as executor [*or* administrator], if the defendant has so much thereof in his hands to be administered; and if he has not, then that the sum of £ [*the costs*] be levied upon the proper goods of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against Executor or Administrator where he admits his Representative Character but denies the demand, and alleges total or partial Administration of Assets, and the Plaintiff proves his Demand, and the Defendant proves Administration.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs. And it is ordered that the defendant do pay the same to the registrar of the court on or before the day of 18

And the defendant having admitted his representative character, but denied the plaintiff's demand, and having also alleged a total [*or* partial administration] of the goods of the said deceased, which came to the hands of the defendant as executor [*or* administrator] to be administered, it appears to the court that the plaintiff has proved to the court his demand, and also that the defendant has proved the administration alleged.

Wherefore it is ordered, That in default of such payment the sum of £ being the costs incurred by the plaintiff in proving his demand, shall be levied on the goods and chattels which were of the said deceased, and which came to the hands of the defendant as executor [*or* administrator], if the defendant has so much thereof in his hands; and if he has not, then that it shall be levied of the proper goods and chattels of the defendant; and as to the sum of £ the plaintiff's demand, that it be levied of the goods and chattels of the said deceased which hereafter shall come to the hands of the defendant as executor [*or* administrator] as aforesaid, to be administered.

And it is further ordered, That the plaintiff do pay the registrar of the court, on or before the day of 18 the sum of £ being the costs incurred by the defendant in proving the administration alleged.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

N.B.—If the defendant is shown to have some assets, the judgment must be for that amount *de bonis testatoris*, and for the residue *quando acciderint*.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against Executor or Administrator, where the Defendant admits his Representative Character but denies the demand, and alleges total or partial Administration of Assets, and the Plaintiff proves his Demand, and the Defendant does not prove the Administration.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and £ for costs. And it ordered that the defendant do pay the same to the registrar of this court on or before the day of 18

And the defendant having admitted his representative character, but denied the plaintiff's demand, and having also alleged a total [*or* partial] administration of the goods of the said deceased, which came to the hands of the defendant as executor [*or* administrator] to be administered, it appears to the court that the plaintiff has proved to the court his demand, and also that the defendant has not proved the administration alleged.

And it is further ordered, That if the defendant shall make default in payment of the said sum, the same shall be levied as follows: The sum of £ [*debt and costs*] of the goods and chattels which were of the said deceased, and which came to the defendant as aforesaid, if the defendant has so much thereof in his hands to be administered; and if he has not, then that the residue of the sum of £ [*debt*] be levied of the goods and chattels of the said deceased which hereafter shall come to the hands of the defendant as executor [*or* administrator] as aforesaid, to be administered; and that the sum of £ [*the costs*] be levied upon the proper goods of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against an Executor or Administrator who admits his Representative Character and the Plaintiff's Demand, but alleges a total or partial Administration of Assets, and proves the Administration.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

(*d*) *Summons to Executor in case Assets have come to his hands since Judgment.*[1]

Upon hearing this cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for and it is ordered that the defendant do pay the same to the registrar of this court on or before the day of 18

And the defendant having admitted his representative character, and also the plaintiff's demand, and having alleged a total [*or* partial] administration of the goods of the said deceased, which came to the hands of the defendant, has proved to the court the administration alleged.

Wherefore it is ordered, That in default of such payment the said sum of £ shall be levied of the goods and chattels of the said deceased, which hereafter shall come to the hands of the defendant as executor [*or* administrator] as aforesaid to be administered.

And it is further ordered, That the plaintiff do pay to the registrar of this court, on or before the day of 18 the sum of £ being the costs incurred by the defendant in proving the administration alleged.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment against an Executor or Administrator who admits his Representative Character and the Plaintiff's Demand, but alleges a total or partial Administration of Assets, and does not prove the Administration.

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing the cause at a court this day holden, it is adjudged that the plaintiff do recover against the defendant the sum of £ for And it is ordered that the defendant do pay the same to the registrar of this court on or before the day of 18

And the defendant having admitted his representative character, and also the plaintiff's demand, and having alleged a total [*or* partial] administration of the goods of the said deceased, which came to the hands of the defendant as executor [*or* administrator] to be administered, it appears to the court that the defendant has not proved to the court the administration alleged.

And it is further ordered, That if the defendant shall make default in payment of the said sum, the same shall be levied as follows: The sum of £ [*debt and costs*] of the goods and chattels which were of the said deceased, and which came to the defendant as aforesaid, if the defendant have so much thereof in his hands to be administered; and if he has not, then that the residue of the sum of £ [*debt*] be levied of the goods and chattels of the said deceased which hereafter shall come to the hands of the defendant as executor [*or* administrator] as aforesaid to be administered; that the sum of £ [*the costs*] be levied upon the proper goods of the defendant.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] *Summons to an Executor of Plaintiff's Intention to apply to the Court where Assets have come to Defendant's hands since Judgment.*

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
[*Address.*]
[*Description.*]
and
C. D. executor [*or* administrator] of deceased, defendant.
[*Address.*]
[*Description.*]

The plaintiff having learned that property of the deceased has come to your (the defendant's) hands as executor [*or* administrator] since the judgment hereon is to be administered, and that you have withholden and wasted the same, intends to apply to the court, to be holden on the day of 18 at the hour of in the noon, for an order that the debt [*or* damages] and costs shall be levied of the goods and chattels of the said deceased, if you have so much thereof to be administered [and that if you have not, then it shall be levied of your proper goods and chattels], and that the costs be levied of your proper goods and chattels.

You are, therefore, hereby summoned to appear at the said court, at the time and place aforesaid, to answer touching the matters aforesaid.

Dated this day of 18

Registrar of the Court.

To the Executor or Administrator of the Deceased.

Hours of attendance at the office of the registrar [*place of office*], from ten till four,

(*e*) *Warrant of Execution against Goods of a Testator.*[1]

(*f*) *Judgment against an Executor on a* Devastavit.[2]

except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] *Warrant of Execution against the Goods of a Testator.*

No. [*of Plaint*].
No. [*of Warrant*].
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

Whereas at a court holden at on the day of 18 the plaintiff obtained a judgment against the defendant as executor [*or* administrator] of the said deceased, for the sum of for due and owing to the plaintiff by the said deceased in his lifetime, and the sum of for costs of suit. And thereupon it was ordered by the court that the defendant should pay the same to the registrar of the court on or before the day of 18 [*or* by instalments of for every days]; and whereas default has been made in payment according to the said order: These are therefore to require and order you forthwith to make a distress and sale of the goods and chattels which were the property of the said deceased in his lifetime, in the hands of the defendant to be administered, wheresoever they may be found within the district of this court, excepting the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of 5*l.*, the sum stated at the foot of this warrant being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, which were the property of the said deceased in his lifetime, which may then be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, if the defendant hath so much thereof in his hands to be administered; then that you make and levy of the proper goods and chattels, money and bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant, the sum of for the costs and charges first above-mentioned and the costs of this execution, and of levying the same, and to pay what you shall have so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18
By the Court.
Registrar of the Court.

To the High-Bailiff of the said Court and others the Bailiffs thereof.

	£	s.	d.
Debt or damage adjudged . . .			
Costs			
Paid into court			
Remaining due			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[*Warrants of Execution upon the judgments given above may be drawn from this form, altered accordingly from those forms.*]

[2] *Judgment against an Executor on a* Devastavit.

No.
In the County Court of
[*Seal.*] Between A. B. plaintiff,
and
C. D. executor [*or* administrator] of deceased, defendant.

Upon hearing the plaintiff's application in this cause at a court this day holden, it is adjudged that property of deceased, has come to the hands of the defendant as his executor [*or* administrator] since the judgment recovered herein to be administered, and that the defendant has wasted the same property, whereby the judgment recovered herein remains unsatisfied: It is therefore ordered, that the defendant do pay the sum of £ recovered by [*or* remaining due upon] the judgment, together with the sum of £ and the costs of this order, to the registrar of this court, on or before [*as the case may be*].

And it is further adjudged, that if the defendant make default in payment thereof, an execution shall issue to make and levy the above-mentioned sums of the goods and chattels of the said deceased, if the defendant has so much thereof in his hands to be administered; and if he has not, then to be made and levied of the proper goods and chattels of the defendant.

Given under the seal of the court this day of 18
By the Court.
Registrar of the Court.

(C) *In case of Joint-Debtors.*

(*a*) *Process may be served on and Judgment obtained against one.*

Process may be served on and judgment obtained against one of joint-debtors.[1]

The 9 & 10 Vic. c. 95, s. 68, enacts, "that where any plaintiff shall have any demand recoverable under this act against two or more persons, jointly answerable, it shall be sufficient if any of such persons be served with process, and judgment may be obtained and execution issued against the person or persons so served, notwithstanding that others jointly liable may not have been served or sued, or may not be within the jurisdiction of the court; and every such person against whom judgment shall have been obtained under this act, and who shall have satisfied such judgment, shall be entitled to demand and recover in the county court, under this act, contribution from any other person jointly liable with him."

XI. Particular Suits and Proceedings in the County Court.

(A) *Of Interpleader Proceedings.*

(*a*) *The Interpleader Summons.*

Where goods taken in execution are claimed by third party, interpleader summons may issue on application of bailiff.

The 9 & 10 Vic. c. 95, s. 118, enacts, "that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court holden under this act, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court, upon application of the officer charged with the execution of such process, as well before as after any action brought against such officer, to issue a summons, calling before the said court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons out of the county court; and the judge of the county court shall adjudicate upon such claim and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in such court."

(1) *Forms of Interpleader Summons.*[2]

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here state the day on which the office will be closed*], when the office will be closed at one.

[1] Rule 90. "Where a plaintiff avails himself of the provisions of section 68 of the 9 & 10 Vic. c. 95, and proceeds against only one or more of several persons jointly answerable, the defendant or defendants sued may avail himself or themselves of any set-off, or other defence to which he or they would be entitled, if all the persons answerable were made defendants."

[2] *Interpleader Summons to Execution Creditor.*

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas [*here insert the name, address, and description of claimant, so far as is then known*] hath made a claim to [certain goods or chattels (*or* monies, &c.) taken in execution under process issuing out of this court at your instance [*or* certain rent alleged to be due to him].

You are therefore hereby summoned to appear at a court to be holden at on the day of at the hour of in the noon, when the said claim will be adjudicated upon, and such order made thereupon as to the judge shall seem fit.

Given under the seal of the court this day of 18

Registrar of the Court.

To the Plaintiff.

Note.—The claimant is called upon to give the particulars of his claim, which you may inspect, on application at the office of the registrar of this court, four days before the day of hearing.

(*b*) *Claimant must make Deposit.*[1]

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Interpleader Summons to a Claimant setting up a Claim to the Goods or the Proceeds thereof.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

[*Name, Address, and Description of Claimant.*]

You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to support a claim made by you to certain goods and chattels [*or* monies, &c.] taken in execution under process issued in this action, at the instance of [*the execution creditor*], and in default of your then establishing such claim the said goods and chattels will then be sold [*or* the said monies, &c., paid over] according to the exigency of the said process: And take notice, that you are hereby required, five days before the said day, to deliver to the officer in charge of the said process, or leave at my office, particulars of the goods and chattels which [*or* the proceeds whereof] are claimed by you, and of the grounds of your claim; and in such particulars you shall set forth fully your name, address, and description: And take notice, that in the event of your not giving such particulars as aforesaid your claim will not be heard by the court.

Given under the seal of the court this day of 18

Registrar of the Court.

To of

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Interpleader Summons to a Claimant setting up a Claim to Rent in respect of the Premises upon which the Execution was levied.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

[*Name, Address, and Description of Claimant.*]

You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to support a claim made by you to certain rent alleged by you to be due in respect of and issuing out of certain premises, upon which certain goods and chattels were taken in execution under process of this court in this action, at the instance of [*the execution creditor*], and in default of your then establishing such claim the said goods and chattels will then be sold, and the proceeds thereof paid over according to the exigency of the said process [*or* if such goods and chattels shall have been then sold, then the proceeds of such sale will be paid over according to the exigency of the said process]: And take notice, that you are hereby required, five days before the said day, to deliver to the officer in charge of the said process, or leave it at my office, particulars of the amount of rent claimed by you, and of the period for which, and of the premises in respect of which you claim such rent, and of the grounds of your claim; and in such particulars you shall set forth fully your name, address, and description: And take notice, that in the event of your not giving such particulars your claim will not be heard by the court.

Given under the seal of the court this day of 18

Registrar of the Court.

To of

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] Rule 130. "Where any claim is made to or in respect of any goods or chattels taken in execution under the process of any county court, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, and summonses have been issued on the application of the bailiff, such summonses shall be served in such time and mode as hereinbefore directed for a summons to appear to a plaint, and the case shall proceed as if the claimant were the plaintiff and the execution creditor the defendant, and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the bailiff, or leave at the office of the registrar of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or in case of a claim for rent, of the amount thereof, and for what period, and in respect of what premises, the same is claimed to be due, and the name, address, and description of the claimant shall be fully set forth in such particular, and any money paid into court under the execution shall be retained by the registrar until the claim shall have been adjudicated upon: Provided that, by consent, an interpleader claim may be tried, although this rule has not been complied with."

When a claim is made the bailiff should at once apply for a summons, but he is not required to withdraw from possession even when the summons is issued. *Ex-parte Summers*, 18 Jur. Ex. 522.

The county court has jurisdiction to entertain an interpleader summons notwithstanding the value of the goods exceeds 50*l*. *M'Kellar v. Summers*, 7 Ex. 179.

Where a summons has issued on an inter-

Claimant must make deposit.

19 & 20 Vic. c. 108, s. 72. "Where any claim shall be made under sect. 118 of the act of the 9th and 10th years of the reign of her present Majesty, chapter 95, to or in respect of any goods taken in execution under the process of a county court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be fixed by appraisement in case of dispute, to be by such bailiff paid into court, to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into court the proceeds of such sale, to abide the decision of the judge."

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pleader claim the judge is bound to adjudicate upon it; and if the claimant has not delivered sufficient particulars, or not delivered them within the time required by the rule, the judge should either amend the particulars or order a new summons to issue, so that he may determine the case on the merits. *Beswick v. Boffey*, 9 Ex. 315; 23 L. J. Ex. 89.

The delivery of particulars of claim, as directed by the above rule, is (if insisted upon by the defendant) a condition precedent to the right of the plaintiff to have the case tried on its merits, and if no particulars are delivered, that is in effect an abandonment of the claim. What are sufficient particulars in individual cases is a question for the county-court judge; but if he decides erroneously that the particulars are not sufficient, and on this ground refuses to hear the case on the merits, or he makes an order adjudging the goods to be the property of the defendant, the judge may be compelled by an order, in the nature of a *mandamus*, to hear the claim. *Reg. v. Stapylton*, 21 L. J. Q. B. 8. *Reg. v. Richards*, 20 id. 351. But if the county-court judge has entered into the merits of the case, such a rule cannot issue, however erroneous may be his decision. *Milner v. Rhoden*, 15 Jur. 1037.

The following particulars were held sufficient:—"I give you notice, that by a certain indenture dated, &c., between G. (the execution debtor) of the one part, and me of the other part, reciting, &c., G. did grant, convey, and assign unto me all his household goods, furniture, and personal estate and effects whatsoever, of him the said G., then, or at any time thereafter during the continuance of the said security, about his houses, brewery, and premises, &c. I do hereby claim all and singular the goods and chattels mentioned and intended to be assigned by the deed, and which were in the possession of G. upon the execution of the said deed, and which said goods and chattels, or some part thereof, have been seized and taken possession of by you by virtue of a certain writ, &c." The county-court judge ruled that these particulars were insufficient, for want of an inventory specifying which of the goods and chattels seized by the bailiff were claimed by the plaintiff; but the Court of Queen's Bench held that they were sufficient. *Reg. v. Stapylton, supra.*

So the following particulars were held sufficient:—"Two horses, two collars, and two bridles, which were seized in a stable at Bagley, in the parish of Hoadley, in the county of Salop, on the 31st of October, A.D. 1850. The ground of our claim to the said two horses, two collars, and two bridles is, that they were assigned to us by an indenture dated the 28th day of May, A.D. 1850, and made between Thomas Holdbrook, defendant in the said cause, of the one part, and ourselves of the other part." *Reg. v. Richards, supra.*

A notice stating merely that the goods taken were the property of the claimant, and not of the execution debtor, is insufficient, and the county-court judge will be justified in refusing to adjudicate upon the claim where the notice is confined to this. *Ex-parte Tanner*, 19 L. J. Q. B. 318. *Reg. v. Chilton*, 15 Q. B. 220; 19 L. J. Q. B. 318.

Where the particulars described the address of the claimant to be "Elizabeth Street, Islington," whereas, in fact, it was "Elizabeth Terrace, Islington," the Court of Exchequer held that the notice was, notwithstanding, sufficient, and that the judge was bound to hear the case on the merits. *Ex-parte M'Fee*, 9 Ex. 261; 23 L. J. Ex. 57.

In the above case a county-court judge decided that the particulars of a claim in an interpleader summons were not sufficient, and refused on that account to hear the claimant. Upon application for a prohibition, the Court of Exchequer held the particulars to be sufficient, and granted the writ to stay further proceedings under the execution.

R. 131. "Interpleader summonses shall be issued by the registrar, on the application of the bailiff, without leave of the court."

R. 132. "Interpleader summonses shall be issued from the court of the district in which the levy was made, and the execution creditor and claimant shall be summoned to such court."

R. 133. "Where the claim to any goods or chattels taken in execution, or the proceeds or value thereof, shall be decided against the claimant, the costs of the bailiff allowed by the judge shall be retained by him out of the amount levied, if the judge shall so order, but without prejudice to the right of the execution creditor against the claimant for the sum so retained."

(*c*) *Order on an Interpleader Summons where the Claim is established.*[1]

(*d*) *Warrant of Execution against the Goods of Claimant.*[2]

Where the judge dismissed the claim, and ordered the costs of the interpleader to be paid by the claimant, and the bailiff afterwards sold the goods and paid the amount of the levy into court, and it was afterwards received by the execution creditor, it was held that the bailiff had no right of action against the execution creditor for his costs of the interpleader. *Bloor v. Huston*, 15 C. B. 266; 24 L. J. C. P. 26.

An appeal lies to the superior courts where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.* 19 & 20 Vic. c. 108, s. 68.

An appeal lies from the decision of a county-court judge in an interpleader issue, if the value of the goods seized exceeds 20*l.*, notwithstanding the debt for which they were taken was under 20*l.* *Vallance v. Naish*, 2 H. & N. 712; 27 L. J. Ex. 142.

Interpleader proceedings cannot be removed by *certiorari*. *Ex-parte Summers*, 18 Jur. Ex. 522.

The object of the 118th section is, that the judge should determine in the interpleader summons to whom the goods belong, and that the order should bar the claim in respect of goods taken in execution, and should be conclusive, so as to prevent the claimant from trying his title to the goods against the officer. Accordingly, where the judge of the county court had made an order adverse to the claimant, it was held that an order to stay proceedings in an action of trespass for breaking and entering the house of the claimant, and taking the goods in question, was proper. *Jessop v. Crawley*, 15 Q. B. 212; 19 L. J. Q. B. 319. See *Tinkler v. Hilder*, 4 Ex. 187; 18 L.J.Ex. 429.

But where, under the 118th section, the judge of a county court adjudicated in favour of a claimant whose house had been broken and entered, and his goods seized and taken away as the goods of an execution creditor in the county court, the Court of Queen's Bench held that the claimant was afterwards entitled to proceed in an action of trespass for the special damage occasioned by the wrongful breaking and entry, but not for the trespass in taking away his goods. *Chater v. Chignell*, 15 Q. B. 217; 19 L. J. Q. B. 520.

[1] *Order on an Interpleader Summons where the Claim is established.*

No.

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.
E. F. claimant.

It is this day adjudged, touching the claim of E. F. to certain goods and chattels [*or* monies, &c.] taken in execution in this action [*or*, to certain rent alleged to be due to him], that the said goods and chattels [*or* monies, &c., or part thereof, to wit, *specifying them*] are his property [*or* that rent to the amount of £ is due to him].

And it is ordered, That the said [*execution creditor*] do pay to the registrar of this court, for the use of the said E. F., £ for costs, on or before the day of 18

Given under the seal of this court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] *Warrant of Execution against the Goods of Claimant.*

(*Folio in Ledger.*)

No. [*of Plaint*].

No. [*of Warrant*].

In the County Court of holden at [*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.
E. F. claimant.

Whereas at a court holden at on the day of 18 the plaintiff, by the judgment of the said court, recovered against the defendant the sum of £ for debt [*or* damages], and for costs: And whereas the defendant, by an order of the court, was ordered to pay the same to the registrar of the court: And whereas default having been made in payment, according to the said order, an execution issued against the goods of the defendant, under which certain goods and chattels were seized, in respect of which E. F., of &c., made claim, and which claim was heard and decided upon at a court held at on the day of 18 and it was adjudged that the goods so seized under the said execution were the property of the defendant [*or* that certain rent alleged by the said E. F., of &c., to be due to him, was not so due]: And it was ordered that the costs of that proceeding, amounting to the sum of £ should be paid to the registrar of the said court, on or before the day of 18

And whereas default has been made in payment according to the said last-mentioned order: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the said claimant, wheresoever they may be found within the district of the court (excepting the wearing apparel and bedding of the said claimant, or his family,

(B) *Proceedings in Replevin.*

(*a*) *Replevin granted by Registrar.*

The registrar grants replevins and issues all necessary process in relation thereto.[1]

19 & 20 Vic. c. 108, s. 63, enacts, "that the powers and responsibilities of the sheriff, with respect to replevin bonds and replevins, shall henceforth cease, and the registrar of the county court of the district in which any distress subject to replevin shall be taken shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high-bailiff."

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and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the claimant which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of the court, and make return of what you have done under this warrant, immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Costs of adjudging			
Poundage of issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said claimant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[1] 9 & 10 Vic. c. 95, s. 119, enacts, "that all actions of replevin in cases of distress for rent in arrear or damage faisant which shall be brought in the county court shall be brought without writ in a court held under this act."

Id. s. 120. "That in every such action of replevin, the plaint shall be entered in the court holden under this act for the district wherein the distress was taken."

If the action be commenced in the county court, and not removed, it must proceed to judgment there, and the court will have jurisdiction to entertain the action, notwithstanding that title to a hereditament, or the like, may be in question. *Reg. v. Raines*, 22 L. J. Q. B. 223. *Tubbey v. Stanhope*, 5 C. B. 790.

Rule 177. "In actions of replevin, no other cause of action shall be joined in the summons."

R. 178. "On entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars the cattle or the several goods or chattels taken under the distress, and of the taking of which he complains."

R. 179. "All actions of replevin in cases of distress for rent in arrear, or for damage feasance, shall be tried in a summary way, as other actions in the courts holden under the authority of the act of the 9 & 10 Vic. c. 95, and the judgment therein in ordinary cases, whether for plaintiff or defendant, shall be according to the forms set forth in the schedule."

R. 180. "Where the distress is for rent, and the defendant succeeds in the action, if the defendant require the judge shall, if the cause be tried without a jury, and the jury shall, if the cause be tried with a jury, find the value of the goods distrained; and if the value be less than the amount of rent in arrear, judgment shall be given for the amount of such value: but if the amount of the rent in arrear be less than the value so found, judgment shall be given for the amount of such rent, and such judgment may be enforced in the same manner as any other judgment of the court."

R. 181. "Where the distress is for damage feasance, and the defendant is entitled to judgment for a return, if the plaintiff require the judge shall, if the cause be tried without a jury, and the jury shall, if the cause be tried with a jury, find the amount of the damage sustained by the defendant, and judgment shall then be given in favour of the defendant, in the alternative for a return, or for the amount of the damage so found."

The following are the fees payable in *Proceedings in Replevin.*

(Additional Table of Fees, 21st Nov. 1856).

For a warrant to replevy . . .	£0	2	6
For a replevin bond, where the alleged rent does not exceed 20*l.*	0	10	6
For a replevin bond, where the alleged rent or damages exceeds 20*l.*	1	1	0
For notice to distrainer	0	2	6
For delivering the goods . . .	1	1	0

Together with sixpence a-mile from the court-house to the place where the goods are.

(1) *Notice to Distrainer.*[1]

(*b*) *Upon Security being given.*

Replevins to be granted on securities given.

19 & 20 Vic. c. 108, s. 64, enacts, "such registrar shall, at the instance of the party whose goods shall have been distrained, cause the same to be replevied to such party on his giving one or other of such securities as are mentioned in the next two succeeding sections.

(*c*) *Bond where Replevin commenced in Superior Court.*

Replevins may be commenced in superior courts. Conditions of security to be given in such cases.

Id. s. 65. "An action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court he shall, at the time of replevying, give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security, within one week from the date thereof, and to prosecute such action with effect, and without delay, and unless judgment thereon be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that such rent or damage exceeded twenty pounds, and to make return of the goods, if a return thereof shall be adjudged."

(1) *Form of Bond.*[2]

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[1] *Notice to Distrainer of Goods* [*or* Cattle] *intended to be Replevied.*

In the County Court of holden at

Take notice, that A. B. of, &c., whose goods [*or* cattle] you have distrained, intends to replevy the same, and has proposed for his sureties for the due prosecution of an action of replevin against you in the [*here mention the court in which the action is to be brought*] E. F. of, &c., and G. H., &c., and that if you have any valid objection to make to the proposed sureties, or either of them, you must attend at [*here insert the place of office of registrar*], on the day of at the hour of when the bond will be submitted to me for approval.

J. K.
Registrar of the Court.

[2] *Bond in Replevin under sect.* 65 *of* 19 & 20 *Vic. c.* 108.

Know all men by these presents, that we, A. B. of, &c., C. D. of, &c., and E. F. of, &c., are held and firmly bound unto G. H.* of, &c., in £ to be paid to the said G. H., or his certain attorney, executors, administrators, or assigns; for which payment to be made we bind ourselves, and each and every of us, in the whole, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and

Whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and his security has been approved of by the registrar of the county court of holden at as appears by his allowance in the margin hereof.†

Now, the condition of this obligation is such, that if the above-bounden A. B. do and shall, within one week from the date of the said obligation, commence an action of replevin against the above-named G. H. in her Majesty's court of at Westminster, for taking and unjustly detaining of certain goods and chattels of the said to wit [*here insert the description of the goods and chattels*], and prosecute such action with effect, and without delay, and unless judgment be obtained therein by default, do and shall prove before the court of that he the said had good ground for believing that the title to the hereditament, in respect of which the distress was made, was in question [*or*, that the title to a toll was in question]; [*or*, that the title to a market was in question]; [*or*, that the title to a fair

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* The distrainer.

† I approve of this bond. J. K. Registrar. (L.S.)

This bond does not require a stamp. See 5 Geo. 4, c. 41.

(*d*) *Bond where Replevin commenced in County Court.*

Conditions of security to be given when replevin brought in county court.

Id. s. 66. "If the replevisor shall wish to commence proceedings in a county court, he shall at the time of replevying give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage, in respect of which the distress shall have been made, and the probable costs of the cause in the county court, conditioned to commence an action of replevin against the distrainer in the county court of the district in which the distress shall have been taken, within one month from the date of the security, and to prosecute such action with effect, and without delay, and to make return of the goods, if a return thereof shall be adjudged."

(1) *Form of Bond.*[1]

(*e*) *Warrant to High-Bailiff to Replevy.*[2]

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was in question]; [*or*, that the title to a franchise was in question]; [*or*, that the alledged rent or damage, in respect of which the distress was made, exceeded twenty pounds]; and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then the obligation shall be void and of no effect; otherwise shall be and remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above-bounden, in the presence of

Note.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.

[1] *Bond in Replevin under sect.* 66 *of* 19 & 20 *Vic. c.* 108.

Know all men by these presents, that we, A. B. of, &c., C. D. of, &c., and E. F. of, &c., are held and firmly bound unto G. H.* of, &c., in £ to be paid to the said G. H., or his certain attorney, executors, administrators, or assigns, for which payment to be made we bind ourselves, and each and every of us, in the whole, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seal, and dated this day of one thousand eight hundred and

Whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by the registrar of the county court of holden at as appears by his allowance in the margin hereof.†

Now, the condition of this obligation is such, that if the above-bounden A. B. do and shall, within one month from the date of the said obligation, commence an action of replevin against the above-named G. H. in the county court of holden at for taking and unjustly detaining of certain goods and chattels of the said to wit [*here insert the description of the goods and chattels*], and prosecute such action with effect and without delay, and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above-bounden, in the presence of

Note.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.

[2] *Warrant to High-Bailiff to Replevy.*

County Court of holden at
[*Seal.*]

Whereas hath given security as well to commence his action of replevin against for the taking and unjustly detaining of certain goods and chattels [*or* cattle] of the said that is to say: and prosecute such action with effect and without delay, as also to return the said goods and chattels, if return thereof shall be adjudged by law: Now, as registrar of the said county court, and by virtue of the provisions of the statute 19 & 20 Vic. c. 108, I hereby authorise and direct you, without delay, to replevy and deliver the said goods and chattels [*or*, cattle] to the said and forthwith to return me this warrant, and what you shall have done under the same.

Dated this day of 18

To the High-Bailiff of the Court.

Registrar of the Court.

In obedience to this warrant I have replevied and caused to be delivered to the within-named the within-mentioned goods and chattels [*or* cattle].

Dated this day of 18

High-Bailiff.

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* The distrainer.

† I approve of this bond. J. K. Registrar. (L.S.)

This bond does not require a stamp.

(f) Removal of Replevin by Certiorari.

Replevins shall, at instance of defendant, be removed into superior court by *certiorari* in certain cases.[1]

Id. s. 67. "Any action of replevin brought in a county court shall be removed into any superior court by writ of *certiorari*, if the defendant shall apply to such superior court, or to a judge thereof, for such writ, and shall give security, to be approved of by the master of such superior court, for such amount, not exceeding 150*l.*, as such master shall think fit, conditioned to defend such action with effect; and unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein, to prove before such superior court that the defendant had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question, or that the rent or damage, in respect of which the distress shall have been taken, exceeds 20*l.*; and every such superior court shall have power to determine the same action."

(g) Judgment in the County Court.[2]

(C) *Of Proceedings for the Recovery of Small Tenements.*

(a) Landlord may recover Possession of Premises in the County Court in certain cases.

Possession of small tenements may be recovered in

The 19 & 20 Vic. c. 108, s. 50, enacts, "where the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof shall have exceeded 50*l.* by the year,[3] and upon which no fine or premium shall have been paid, shall have expired, or shall have

[1] If the plaint has been removed by the defendant, the plaintiff is only liable to comply with the terms of the replevin-bond. In that case the defendant must comply with the terms of the bond given on removal, and in case of default he may be sued upon it. *Tummons v. Ogle*, 25 L. J. Q. B. 403.

Where the replevin is determined in the county court, an appeal lies to the superior courts, provided the amount of rent or damage exceeds 20*l.* 19 & 20 Vic. c. 108, s. 68.

[2] *Judgment for Defendant in Replevin for Rent.*

No.
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause at a court holden this day, it is adjudged that the plaintiff do return to the defendant the goods and chattels [*or* cattle, *stating the particulars thereof*], and pay to the registrar of the court forthwith [*or* on the day of], the sum of £ for costs of suit [*or*, it is adjudged that the amount due for rent in arrear from the plaintiff to the defendant is £ and that the goods and chattels (*or* cattle) were of the value of £ and that the plaintiff do forthwith (*or* on the day of) pay to the registrar of the court, at his office, the said sum of £ and also the sum of £ for costs of suit.]

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment for Defendant in Replevin of Cattle Damage Faisant.

No.
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause at a court holden this day, it is adjudged that the plaintiff do return to the defendant the cattle [*here specify the cattle*], or to pay to the registrar of this court forthwith [*or* on the day of] the sum of £ which is now adjudged to be the amount of damage sustained by the defendant.

It is also adjudged that the plaintiff do pay to the registrar of the court, on the day and year aforesaid, the sum of £ for costs.

Given under the seal of the court this day of 18

By the Court.
Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[3] Where the tenant had entered into a written agreement with the landlord to take certain premises at 20*s.* a week, payable on demand, and subject to four weeks' notice to quit on either side, and during the continuance of this tenancy a verbal agreement was made between the parties that the rent should be 16*s.* a week, and the tenant for several weeks paid this reduced amount, and on one occasion submitted to a dis-

county courts by landlords, where term has expired or been determined by landlord or tenant.

been determined either by the landlord [1] or the tenant by a legal notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option, either against such tenant or against such person so neglecting or refusing, in the county court of the district in which the premises lie, for the recovery of the same,[2] and thereupon a summons [3] shall issue to such tenant, or such person so neglecting or refusing; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then, on proof of his still neglecting or refusing to deliver up possession of the premises, and of the yearly value and rent of the premises, and of the holding, and of the expiration or other determination of the tenancy,[4] with the time and manner thereof, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons, if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant,[5] authorising and requiring the high-bailiff of the court to give possession of such premises to the plaintiff." See *Jones v. Thomas*, 4 L. T. (N. S.) 210; and as to suit pending in superior court, *see* 10 W. R. 109; 5 L. T. (N. S.), 321.

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tress, it was held that there was no fresh demise, and that the original rent continued to be the rent payable; and therefore that no proceedings could be taken in the county court under the 122d section, as the jurisdiction does not attach where either the rent or the value of the premises exceeds 50*l.* a year. *Crowley v. Vitty*, 7 Ex. 319; 21 L. J. Ex. 135.

[1] The county court has no jurisdiction unless the ordinary relation of landlord and tenant subsists between the parties. Therefore it has no jurisdiction to grant possession of a house and premises to a party who is the owner of them, and claims to be landlord, when the occupier is in possession under an agreement for purchase. *Banks v. Rebbeck*, 20 L. J. Q. B. 476. So if the only relation between the parties is that of mortgagor and mortgagee. *Jones v. Owen*, 5 D. & L. 669; 18 L. J. Q. B. 8. *Sed vide* 4 L. T. (N. S.) 210.

[2] The proviso of the 58th section of the 9 & 10 Vic. c. 95, applies to proceedings for the recovery of tenements. If, therefore, in any action of ejectment brought by a landlord against his tenant, it should appear that the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, should be in question, or the validity of any devise, bequest, or limitation under any will or settlement should be disputed, the county court will be ousted of its jurisdiction. Where, on application for a prohibition to stay proceedings in ejectment in the county court, it appeared that the defendant held, as tenant to C. during his lifetime, two farms, C. being leaseholder of the one and owner in fee of the other, and that C. had died, and the plaintiff produced a will of C. by which he was created devisee of all C.'s real estate, and appointed executor, the defendant *bonâ fide* disputed the validity of the will: the Court of Queen's Bench held, on application for a prohibition, that the title to the leasehold could not come in question, inasmuch as the probate granted to the plaintiff was conclusive evidence that the title to them was in him; but that the title to the freehold did not come in question, and the prohibition was issued as to the latter, but refused as to the former. *Kerkin v. Kerkin*, 3 E. & B. 399.

[3] By the 19 & 20 Vic. c. 108, s. 54, "a summons for the recovery of a tenement may be served like other summonses to appear to plaints in county courts; and if the defendant cannot be found, and his place of dwelling shall either not be known or admission thereto cannot be obtained for serving any such summons, a copy of the summons shall be posted on some conspicuous part of the premises sought to be recovered, and such posting shall be deemed good service on the defendant."

[4] The decision of the county-court judge under the 50th sec., that the tenancy has expired, is not, it would seem, conclusive, since it is a question upon the answer to which his jurisdiction depends. See *Jones v. Owen*, 5 D. & L. 669; 18 L. J. Q. B. 8. *Lilley v. Harvey*, 17 L. J. Q. B. 357. *Contra*, *Fearon v. Nowall*, 5 D. & L. 439; 17 L. J. Q. B. 161: *per Erle, J.*

[5] By the 19 & 20 Vic. c. 108, sec. 55, "any warrant to a high-bailiff to give possession of a tenement shall justify the bailiff named therein in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession accordingly; but no entry upon any such warrant shall be made except between the hours of nine in the morning and four in the afternoon."

"Every such warrant shall, on whatever day it may be issued, bear date on the

(1) *Summons to Tenant holding over.*[1]

day next after the last day named by the judge in his order for the delivery of possession of the premises in question, and shall continue in force for three months from such date, and no longer, but no order for delivery of possession need be drawn up or served." 19 & 20 Vic. c. 108, s. 56.

By 9 & 10 Vic. c. 95, s. 124, it is enacted, "that it shall not be lawful to bring any action or prosecution against the judge or against the clerk of the court by whom such warrant as aforesaid shall have been issued, or against any bailiff or other person by whom such warrant may be executed, or summons affixed for issuing such warrant, or executing the same respectively, or affixing such summons, by reason that the person by whom the same shall be sued out had not lawful right to the possession of the premises."

And by sect. 125, "where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under the authority of this act; but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: Provided that if the special damage so laid be not proved the defendant shall be entitled to a verdict, and that if proved, but assessed by the jury at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been holden shall certify that, in his opinion, full costs ought to be allowed."

[1] *Summons to a Tenant or other Person holding over.*

No. [*of Plaint*].
In the County Court of at
[*Seal.*]

Between A. B. plaintiff,
[*Address.*]
[*Description.*]
and
C. D. defendant.
[*Address.*]
[*Description.*]

You are hereby summoned to appear at a county court to be holden at on the day of 18 at the hour of in the noon, to answer the plaintiff wherefore you neglect or refuse to deliver up to him possession of a certain [messuage with appurtenances, *or* part of a house, &c. *or as the case may be*] situate at

And take notice, That the plaintiff claims of you for rent [*or*, mesne profits, *or* for rent and mesne profits] the sum of for a period from the day of 18 to the day of 18

And further take notice, If you do not appear at the said court, and show cause why you do not deliver up possession as aforesaid, the judge of the said court may order that possession of the said premises be given by you to the plaintiff forthwith, or on or before such day as the judge shall name, and that if such order be made and be not obeyed a warrant may issue to give possession to the plaintiff.

Dated the day of 18

Registrar of the Court.

To the Defendant.

	£	s.	d.
Costs of this summons			
Claim for			
£			

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*] when the office will be closed at one.

(On back.)

Take notice, If the plaintiff in this action be not your immediate landlord, you must, upon your being served with this summons, or if this summons shall come to your knowledge, forthwith give notice thereof to your immediate landlord, and if you do not give such notice you will be liable, under sect. 53 of 19 & 20 Vic. c. 108, to forfeit to your immediate landlord three years' back-rent of the premises held by you of him, in respect of which the summons shall have issued.

Summons under sect. 52 *of* 19 *&* 20 *Vic. c.* 108.

No.
In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
[*Address.*]
[*Description.*]
and
C. D. defendant.
[*Address.*]
[*Description.*]

You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to answer the plaintiff why possession of a certain situate at should not be given up to the plaintiff, by reason of the rent payable in respect thereof by you being half a year in arrear, and the plaintiff having right by law to re-enter for the non-payment thereof.

If you shall pay to the registrar the rent in arrear, and costs of this action, as stated at the foot of the summons, five clear days before the day you are required to appear to this summons, this action will cease.

(*b*) *The Landlord may recover Rent or Mesne Profits not exceeding 50l.*

In plaint for recovery of possession plaintiff may claim for rent and mesne profits.[1]

19 & 20 Vic. c. 108, sect. 51. "In any such plaint against a tenant, as on the last preceding section is specified, the plaintiff may add a claim for rent or mesne profits, or both, down to the day appointed for the hearing, or to any preceding day named in the plaint, so as the same shall not exceed fifty pounds; and any misdescription in the nature of such claim may be amended at the trial."

(*c*) *And Possession may be recovered for Non-payment of Rent.*

Possession of small tenements may be recovered in county courts by landlords for non-payment of rent.

Id. sect. 52. "When the rent of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof exceeds fifty pounds by the year, shall for one half-year be in arrear, and the landlord shall have right by law to re-enter for the non-payment thereof, he may, without any formal demand or re-entry, enter a plaint in the county court of the district in which the premises lie for the recovery of the premises, and thereupon a summons shall issue to the tenant, the service whereof shall stand in lieu of a demand and re-entry; and if the tenant shall, five clear days before the return day of such summons, pay into court all rent in arrear, and the costs, the said action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, then, on proof of the yearly value and rent of the premises, and of the fact that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to countervail such arrear, and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons, if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than four weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs be paid into court; and if such order be not obeyed, and such rent and costs be not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorising and requiring the high-bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff shall from the time of the execution of such warrant hold the premises discharged of the tenancy, and the defendant,

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And take notice, That if you do not pay such rent in arrear and costs, or appear at this said court, and show cause why possession of the said should not be recovered against you, you may be ordered by the court to give possession of such premises to the plaintiff, and that if such order be not obeyed a warrant may issue to give possession to the plaintiff.

Dated this day of 18

Registrar of the Court.

	£	*s.*	*d.*
Cost of this summons . .	:	:	

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

(On back.)

Take notice, If the plaintiff in this action be not your immediate landlord, you must, upon your being served with this summons, or if this summons shall come to your knowledge, forthwith give notice thereof to your immediate landlord; and if you do not give such notice you will be liable, under sect. 53 of 19 & 20 Vic. c. 108, to forfeit to your immediate landlord three years' back-rent of the premises held by you of him, in respect of which the summons shall have issued.

[1] R. 176. "Where a claim for rent or mesne profits, or both, is added to a plaint for the recovery of possession of a tenement, and the additional poundage to be taken on the amount or amounts so claimed would, with the poundage to be taken on the rent of the tenement, exceed the poundage which is to be taken on a claim for twenty pounds, the total poundage to be taken shall be estimated on twenty pounds only."

and all persons claiming by, through, or under him, shall, so long as the order of the court remains unreversed, be barred from all relief in equity or otherwise."

(d) Sub-tenant must give Notice to his Landlord.

Id. sect. 53. "Where any summons for the recovery of a tenement as is hereinbefore specified shall be served on or come to the knowledge of any sub-tenant of the plaintiff's immediate tenant, such sub-tenant being an occupier of the whole or of a part of the premises sought to be recovered, he shall forthwith give notice thereof to his immediate landlord, under penalty of forfeiting three years' rack-rent of the premises held by such sub-tenant to such landlord, to be recovered by such landlord by action in the court from which summons shall have issued; and such landlord, on the receipt of such notice, if not originally a defendant, may be added or substituted as a defendant to defend possession of the premises in question."

Sub-tenant must give notice to his landlord.[1]

(e) Order for Recovery of Tenement.[2]

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[1] If it appears that the tenant went out of possession on a third person claiming title to the premises, whose title the tenant set up at the hearing against that of the plaintiff, his landlord, the county-court judge should ascertain whether the tenant went out of possession voluntarily or by an act of compulsion: if voluntarily, the tenant is estopped from setting up the title of the third person, and the judge has jurisdiction; if by an act of compulsion, then the tenant is not so estopped and title comes in question, and the jurisdiction of the county court is ousted. *Emery v. Barnett*, 27 L. J. C. P. 216.

An appeal lies to the superior court where the yearly rent or value of the premises exceeds 20*l.* 19 & 20 Vic. c. 108, s. 68.

[2] *Order for Recovery of Tenement.*

No.

In the County Court of at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon the hearing of this cause at a court holden this day, it is ordered, that the defendant do give to the plaintiff possession of a certain [*or* messuage, *or* part of a certain house with appurtenances, *or as the case may be*] situate at forthwith [*or* on the day of]; and it is adjudged that the plaintiff do recover against the defendant the sum of £ for rent [*or* mesne profits, *or* for rent and mesne profits] and £ costs.

And it is ordered, That the defendant do pay to the registrar of the court the sum [*or* sums] above-mentioned on or before the day of 18

Given under the seal of the court this day of 18

By the Court,

Registrar of the Court.

To the Defendant.

Take notice, That if you do not give such possession, a warrant may issue requiring the bailiff of the court to give possession of the said to the plaintiff, and to levy the sum above-mentioned, together with further costs.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*] when the office will be closed at one.

Warrant for giving Possession of Tenement.

No. [*of Plaint*].

No. [*of Warrant*].

In the County Court of at

[*Seal.*] Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of 18 it was ordered by the court that the defendant should give the plaintiff possession of a certain [*as in summons*] situate at and that the plaintiff should recover against the defendant the sum of £ for rent [*or* mesne profits, *or* rent and mesne profits] and costs.

And whereas the defendant has not obeyed the said order: These are therefore to authorise and require you to forthwith give possession of the said hereinbefore-mentioned premises to the plaintiff: and these are therefore further to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the said sum and the costs of this warrant and execution; and also to seize and take any money or bank-notes, whether of the Bank of England or any other bank, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, of the defendant, which may be there found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and

(D) *Proceedings under the Summary Procedure on Bills of Exchange Act.*[1]

By the 9th section of the Summary Procedure on Bills of Exchange Act (18 & 19 Vic. c. 67), it is enacted, that "it shall be lawful for her Majesty from time to time, by an order in council, to direct that all or any part of the provisions of this act shall apply to all or any court or courts of record in England and Wales," &c. In pursuance of this power her Majesty, by an order in council, published in the *London Gazette* of February 1, 1856, ordered that the act should apply to the county courts in all cases where the amount sought to be recovered on a bill of exchange does not exceed 50*l.*; and that it should come into operation in all these courts on the 1st of March 1856.[2]

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executing the same, and to pay the amount so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court,
Registrar of the Court.

To the High-Bailiff of the said Court.

	£	*s.*	*d.*
Rent [*or* mesne profits] [*or* rent and mesne profits]			
Costs			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[1] The County Court Acts apply where the debt does not exceed 20*l.*, although it may be secured by or claimed upon a bill of exchange or promissory note, notwithstanding the 18 & 19 Vic. c. 67; 19 & 20 Vic. c. 108, s. 4.

Rule 84. "Where a summons has issued under sect. 28 of 19 & 20 Vic. c. 108, or under the Bills of Exchange Act, 1855, and judgment is allowed to go by default, the fee to be taken is 1*s.* in the pound."

[2] For the Summary Procedure on Bills of Exchange Act and the proceedings under it *see* vol. ii. p. 487, *et seq.*

The following rules have been promulgated to regulate these proceedings in the county court:—

Rule 189. "Where a defendant applies for leave to defend, he shall satisfy the judge, or in his absence the registrar, by affidavit, that good grounds exist for granting leave to defend the action, and shall leave with the registrar such affidavit, together with a copy thereof; and shall, if required so to do by the judge or registrar, give security according to the provisions of sect. 2 of 18 & 19 Vic. c. 67." *See* vol. ii. p. 489.

R. 190. "Where leave is given to defend, the registrar shall appoint the cause to be heard at the first convenient sitting of the court to be held after such leave is granted, and shall send to the plaintiff notice thereof, according to the form set forth in the schedule, together with the copy of affidavits made by the defendant, and shall also send to the defendant, by post, a notice according to the form in the schedule."

R. 191. "No order on a judgment by default under 18 & 19 Vic. c. 67, need be drawn up or served."

R. 192. "Any application under sect. 3 of 18 & 19 Vic. c. 67, to set aside the judgment, shall be made to the judge of the court; but until the judge can hear the same execution shall be stayed, upon the defendant's giving security to abide the decision of the judge in accordance with the practice in cases of appeal under rules 142 and 143."

The following forms have been prescribed for proceedings under this act in the county court. They are numbered as in the rules:

Summons under The Summary Procedure on Bills of Exchange Act, 1855.

No. [*of Plaint*].

In the County Court of holden at
[*Seal.*] Between A. B. plaintiff,
[*Address*],
[*Description*],
and
C. D. defendant,
[*Address*],
[*Description*].

You are hereby warned, that unless within twelve days after the personal service of the summons on you, inclusive of the day of such service, you obtain leave from the judge of this court, or, in his absence, from the registrar of this court, to defend this action, the plaintiff may proceed to judgment and execution.

Dated this day of 18

Registrar of the Court.

To the Defendant.

N.B. The summons must be served personally on the defendant within six calendar months from the date hereof, and not afterwards.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Indorsement to be made on the Summons before Service thereof.

The plaintiff claims £ for principal and interest [*or* balance of principal and interest] due to him as the payee [*or* indorsee] of a bill of exchange or promissory note, [and all indorsements upon it], and also for noting, and the sum of for court fees [and costs herein]: And if the amount thereof be paid to the registrar of the court four days from the service thereof, no further proceedings will be taken.

Leave to defend may be obtained upon application at the office of the registrar of this court, supported by affidavit, showing that there is a defence to the action on the merits, or disclosing facts showing that it is reasonable that the defendant shall be allowed to defend the action.

Indorsement to be made on the Summons after Service.

This summons was served by personally on [*the defendant or defendants*] on the day of 18

Certificate of Deposit.

In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

I do hereby certify, that the plaintiff [*or* defendant] has paid into my hands the sum of £ [*or here state the proceeding which has rendered the deposit necessary*].

Registrar of the Court.

Dated this day of 18

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Notice of Sureties.

In the County Court of holden at
Between A. B. plaintiff,
and
C. D. defendant.

Take notice, that the sureties whom I propose as my security in the above cause [*here state the proceeding which has rendered the sureties necessary*] are [*here state the full names and additions of the sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets, and numbers, if any.*]

Dated this day of 18

To the

Affidavit of Justification.

In the County Court of holden at
Between A. B. plaintiff,
and
C. D. Defendant.

I, of one of the sureties for the defendant make oath and say, that I am a housekeeper [*or* freeholder, *as the case may be*], residing [*describing particularly the county or city, the street or place, or the number of the house, (if any)*], that I am worth property to the amount of £ [*the amount required by the practice of the court*], over and above what will pay my just debts [*if security in any other action, or for any other purpose, add,* and every other sum for which I am now security], that I am not bail or security in any other action or proceeding, or for any other person [*or if security in any other action or actions, add,* except for C. D. at the suit of E. F. in the court of in the sum of £ for G. H. in the suit of J. K., in the court of in the sum of £ *specifying the several actions, with the courts in which they are brought, and the sums in which he has become bound*]; that this my property, to the amount of the said sum of £ [*and if security in any other action, &c.,* over and above all other sums for which I am now security as aforesaid], consists of [*here specify the nature and value of the property in respect of which the deponent proposes to become bondsman, as follows*]: Stock in trade in my business of carried on by me at of the value of £ of good book-debts owing to me to the amount of £ of furniture in my house at of the value of £ of a freehold [*or* leasehold farm] of the value of £ situate at occupied by or of a dwelling-house of the value of £ situated at occupied by or of other property, [*particularising each description of property, with the value thereof*], and that I have for the last six months resided at [*describing the place of such residence; or if he has had more than one residence during that period, state it in the same manner as above directed*].

Sworn, &c.

Bond under Bills of Exchange Act.

Know all men by these presents that we, A. B. of, &c., and E. F. of, &c., are jointly and severally held, and firmly bound to G. H. or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and

Whereas an action has been brought in the county court of holden at wherein the above-named G. H. is plaintiff, and the above-bounden A. B. is defendant, on a certain bill of exchange [*or* promissory note] under the Summary Procedure on Bills of Exchange Act, 1855.

And whereas leave has been duly given, according to the provisions of the said act, to the said A. B., to defend the said action, upon his giving security, to be approved by the registrar of the court aforesaid, for the amount claimed in the said action, and costs of trial thereof.

And whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obli-

(E) *Proceedings in the nature of a* Scire Facias.[1]

(*a*) *Summons in nature of a* Scire Facias.[2]

gation for the purposes aforesaid, and the security intended to be given has been appointed by the registrar of the said county court, as appears by his allowance in the margin hereof:* Now the condition of this obligation is such that if the above-bounden A. B., C. D., and E. F., any or either of them, shall pay unto the said G. H. his executors, administrators, or assigns, the amount claimed in the said action, and the costs of the trial thereof, upon judgment being given for the plaintiff, then this obligation shall be void, otherwise shall remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above-bounden, in the presence of

Note. If a deposit of money be made the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.

Notice of Leave given to Defend.

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

Take notice, That the defendant has obtained leave to appear at a county court to be holden at on the day of at the hour of in the noon, to defend this action.

The defendant has obtained such leave on the ground set forth in an affidavit, a copy of which is hereunto annexed [and has paid to me the sum claimed by you, to abide the decision of the court, *or*, has given security for the amount claimed by you, and the costs of this action].

Dated this day of 18
Registrar of the Court.

To the Plaintiff.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Notice to the Defendant of the day on which cause is to be heard upon leave being given to defend.

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
C. D. defendant.

Leave having been given to the defendant to defend this action, he is hereby informed that it will be tried at on the day of at the hour of in the forenoon.

Dated this day of 18
Registrar of the Court.

To the Defendant.

[1] Rule 154. "Execution on a judgment shall not issue by or against any person not a party to the suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same as in ordinary cases."

R. 155. "Where a judgment has been given for or against a person deceased, his executors or administrators may in the same manner sue or be sued upon the judgment."

R. 156. "In all proceedings in the nature of a *scire facias*, a jury may be summoned in the same manner and under the like restrictions as are provided by sects. 70, 71, 72, and 73, of 9 & 10 Vic. c. 95."

[2] *Summons in nature of a* Scire Facias *where any Change of Plaintiff.*

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between E. F. plaintiff,
[*Address,*]
[*Description,*]
and
C. D. defendant,
[*Address,*]
[*Description,*]

Whereas A. B., at a court holden at on the day of 18 obtained a judgment against you for the sum of £ for debt and costs, which judgment now remains unsatisfied: And whereas the said A. B. has since died [*or state circumstances requiring revival of judgment*], and the said plaintiff is his executor [*or state representative character*]: You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to show cause why judgment should not be entered up at the suit of plaintiff on the judgment so obtained against you, and why execution shall not issue thereon.

Dated this day of 18
Registrar of the Court.

	£	s.	d.
Due on judgment . .	:	:	

To the Defendant.

N.B. Where the judgment in the original cause was for the defendant, the above form must be altered accordingly.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

* I approve of this bond.—J. K. Registrar. (L.S.) This bond requires a stamp.

(*b*) *Judgment in* Scire Facias.[1]

(F) *Transmission of Action in Superior Court to County Court.—Actions in the Superior Courts may, by Order of a Judge, be sent to the County Court for Trial where Claim does not exceed 50l.*

The 19 & 20 Vic. c. 108, s. 26, enacts, "where in any action of contract In certain

Summons in nature of Scire Facias *where any Change of Defendant.*

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
[*Address,*]
[*Description,*]
and
C. D. defendant,
[*Address,*]
[*Description,*]

Whereas the plaintiff, at a court holden at on the day of 18 obtained a judgment against C. D., of [*name, address, and description of C. D.*], for the sum of £ for and costs, which judgment now remains unsatisfied: And whereas the said C. D. has since died [*or state cause of revival being necessary*], and you are his executor [*or state other representative character*]: You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to show cause why judgment should not be entered up against you at the suit of the plaintiff, on the judgment so obtained, and why execution should not issue thereon.

Dated this day of 18
Registrar of the Court.

To the Defendant.

	£	*s.*	*d.*
Due on judgment . .	:	:	

N.B. Where the judgment in the original cause was for the defendant, the above form must be altered accordingly.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] *Judgment in* Scire Facias: *Summons on Change of Plaintiff.*

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between E. F. plaintiff,
and
C. D. defendant.

Whereas A. B., at a court holden at on the day of 18 obtained a judgment against the defendant for payment of £ for and costs, and which said judgment now remains unsatisfied: And whereas the said A. B. has since died [*or state circumstance requiring revival of judgment*], and the plaintiff is his executor [*or state other representative character*].

It is ordered, That the said plaintiff be at liberty to issue execution on the said judgment against the said defendant [and for the sum of £ * for further costs].

Given under the seal of the court this day of 18
By the Court.
Registrar of the Court.

	£	*s.*	*d.*
Due on judgment . .	:	:	

N.B. Where the judgment in the original cause was for the defendant, the above form must be altered accordingly.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Judgment in Scire Facias *on Change of Defendant.*

No. [*of Plaint*].
In the County Court of holden at
[*Seal.*]
Between A. B. plaintiff,
and
E. F. defendant.

Whereas the plaintiff, at a court holden at on the day of 18 obtained a judgment against C. D. for the sum of £ for and costs, and which judgment now remains unsatisfied: And whereas the said C. D. has since died [*or state other circumstances requiring revival of judgment*], and the defendant is his executor [*or state other representative character*].

[*Conclude according to the rules and forms as to executors, and the defence made.*]

Given under the seal of the court this day of 18
By the Court.
Registrar of the Court.

	£	*s.*	*d.*
Due on Judgment . .	:	:	

N.B. Where the judgment in the original cause was for the defendant, the above form must be altered accordingly.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

* Here insert the sum, if any, allowed to the plaintiff as costs by the judgment.

cases judge of superior court may order cause to be tried in county court.[1]

brought in a superior court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a superior court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent, by post or otherwise, by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

(*a*) *Form of Notice to Parties.*[2]

(*b*) „ *Certificate to Superior Court of Result.*[3]

(G) *Detinue.*

Judgment is for value of goods, and damages for detention.

Rule 182. "The judgment in detinue, if for the plaintiff, shall be for the value of the goods detained, together with a sum to be stated in the judgment by way of damages for the detention and costs; but it may be made part of the order that on payment of damages for the detention and costs and return of the goods, on or before a day to be named, satisfaction shall be entered."

(*a*) *Form of Judgment.*[4]

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[1] Rule 65. "Where any action under sec. 26 of 19 & 20 Vic. c. 108, is ordered to be tried in a county court, the registrar of the county court mentioned in the order shall enter the same in the minute-book of the court for hearing on the day appointed by the judge of such court, and the same fee shall be taken for the hearing thereof as if a plaint in the action had been originally entered in the county court."

So much of the Common Law Procedure Act, 1854, as enabled any one of her Majesty's superior courts of common law at Westminster, or any judge thereof, to refer any cause to the judge of any county court, has been repealed by the 21 & 22 Vic. c. 74, s. 5.

A writ of trial cannot be directed to a county-court judge under the 3 & 4 Wm. 4, c. 42, s. 17. *Owens v. Breese*, 6 Ex. 916; 20 L. J. Ex. 359.

[2] *Notice to be sent to both Parties under sec.* 26 *of* 19 *&* 20 *Vic. c.* 108.

In the County Court of holden at
[*Seal.*]

Whereas under the provision of sec. 26 of 19 & 20 Vic. c. 108, an action commenced in the Court of [*name of superior court*], wherein A. B., of, &c., is plaintiff, and C. D., of, &c., is defendant, has been ordered by [*name of judge of superior court*] to be tried in this court:

Take notice, That the said action will be heard in this court on the day of at the hour of in the noon.

Given under the seal of the court this day of 18

Registrar of the Court.

To Plaintiff and Defendant.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[3] *Certificate of the Result of the Hearing of a Cause under sec.* 26 *of* 19 *&* 20 *Vic. c.* 108.

[*Seal.*]

In the County Court of holden at

I hereby certify that an action commenced in the Court of [*name of superior court*], wherein A. B. is plaintiff and C. D. is defendant, which, under sec. 26 of 19 & 20 Vic. c. 108, was ordered by [*name of judge of superior court*] to be tried in this court, has been heard accordingly in this court on this day, and that the result was as follows:

[*State the finding on the several issues joined in the action, or that the plaintiff was nonsuited.*]

Dated this day of 18

Registrar of the Court.

[4] *Judgment in Detinue.*

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause at a court holden this day, it is adjudged that the plaintiff do recover against the defendant the sum of £ the same being now this day assessed by this court to be of the value of the following chattels of the plaintiff wrongfully detained by the defendant; that is to say [*here enumerate the chattels which the court decides to have been detained*], and the further

(*b*) *Warrant of Execution.*[1]

(H) *Acknowledgments by Married Women.*

19 & 20 Vic. c. 108, s. 73, "any acknowledgment to be made by any mar- Acknowledg-

sum of £ for costs; and it is ordered that the defendant do pay the said several sums to the registrar of the court on the day of 18

‡ And it is further ordered, That if the defendant shall, on or before the said last-mentioned day, pay the registrar the said sums respectively above ordered to be paid for damages and costs, and also return to the plaintiff the said chattels, and if the plaintiff shall then accept the same, then satisfaction of this judgment shall be entered up by the registrar on the production to him of a receipt for the said chattels, signed by the plaintiff or his attorney or agent, into court.

Acknowledgment of Payment into Court.

£	s.	d.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[1] *Warrant of Execution in Detinue against Goods of Defendant.*

No. [*of Plaint*].
No. [*of Warrant*].
In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of 18 the plaintiff obtained a judgment against the defendant for the sum of £ the same being assessed by this court to be the value of certain chattels of the plaintiff wrongfully detained by the plaintiff, and for the further payment of £ for damages for the detention of the said chattels, and of £ for costs; and thereupon it was ordered by the court that the defendant should pay the same to the registrar of this court, on the day of [*or*, by instalments of for every days, the first instalment to be paid on the day of 18]; * And it was further ordered, that if the defendant should, on or before the said last-mentioned day, pay to the registrar the said sums respectively above ordered to be paid, for damages and costs, and also return to the plaintiff the said chattels, and if the plaintiff should then accept the same, then satisfaction of the said judgment should be entered up by the registrar on the production to him of a receipt to the said chattels, signed by the plaintiff or his attorney: * And whereas † the defendant did not on the said day of 18 return the said chattels to the plaintiff, and default † has "also" been made in payment according to the said orders: These are therefore to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (except the wearing apparel and bedding of him or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff under the said order, including the costs of this execution; and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant, which may there be found, or such part and so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of this court, and to make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Value of goods detained . . .			
Damages for the detention . . .			
Costs			
Paid into court			
Remaining due			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

N. B.—If the judgment do not contain the words between asterisks, omit those words in the warrant, and also the words between the marks (†) and (†), and the word "also."

‡ This paragraph is not to be added unless it be part of the order of the judge.

ments by married women received by judge.

ried woman of any deed under the act of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter seventy-four, may be received by a judge of a county court in the same manner as such acknowledgment may be received by a judge of a superior court."

(I) *Proceedings under the Industrial, and Provident, and Literary and Scientific Institutions, and the Friendly Society Acts.*[1]

(*a*) *Form of Summons.*[2]

(*b*) „ *Order.*[3]

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[1] Rule 186. "In proceedings in the county courts under 15 & 16 Vic. c. 31; 17 & 18 Vic. c. 112; and 18 & 19 Vic. c. 63, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of such courts shall be adopted with respect to such proceedings, so far as the same are applicable."

R. 187. "Where a defendant is a trustee, member of the general committee of management, treasurer, or other officer of an institution or society established under an act mentioned in the last rule, the summons shall be served in the mode, if any, prescribed by the act under which any such institution or society is established or regulated; and if no mode of service be thereby prescribed, then at the usual place of business of the institution or society; and if there be no such place of business, then according to the ordinary practice of the court."

For proceedings under the Friendly Societies Act, 1855, and the Industrial and Provident Societies Act, 1852, the same fees shall be taken as upon the entry and hearing of a plaint in the county court, regard being had to the amount in dispute; and if the application to the court is not for the payment of money, the fees shall be estimated upon the amount of the sum of money or penalty which the applicant may state he shall apply to the court to order the payment of, in the event of the other party refusing or neglecting to comply with the order of the court.

The fees to be taken must not be estimated on more than 20*l.* Table of 21st November, 1856.

For proceedings under the Merchant Shipping Act, 1854, the Literary and Scientific Societies Act, 1854, and the Metropolitan Buildings Act, 1855, the same fees shall be taken as upon the entry and hearing of a plaint in the county court, regard being had to the amount, if any, in dispute; and if no amount is in dispute, or if the amount in dispute is not ascertained, then as upon a claim for a sum of 20*l.* Table of 21st November, 1856.

The fees cannot be estimated on more than 20*l.* Id.

[2] *Summons under the Friendly Societies and other Acts.*

No. [*of Plaint*].

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
[*Address.*]
[*Description.*]
and
C. D. defendant.
[*Address.*]
[*Description, adding thereto the office in the society as the holder of which he is summoned, and the name of the society.*]

You are hereby summoned to appear at a court to be holden at on the day of 18 at the hour of in the noon, to answer the plaintiff in the matter, the particulars of which are hereunto annexed.

Dated the day of 18

Registrar of the Court.

To the Defendant.

Summons for witnesses and for the production of documents will issue, upon application at the office of the registrar.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here state the day on which the office will be closed*], when the office will be closed at one.

[3] *Order under the Friendly Societies and other Acts.*

No.

In the County Court of holden at
[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Upon hearing this cause at a court this day holden, it is ordered that the defendant do [*here insert the terms of the order made by the court*].

And it is further ordered, that if the defendant do not obey the terms of the said order, he shall pay to the registrar of this court, on or before the day of the sum of £ by way of penalty, and the sum of £ for costs.

Given under the seal of the court this day of 18

By the Court,

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

(c) *Order for Warrant of Execution.*[1]

(J) *Succession Duty Act*, 1853.[2]

(K) *The Metropolitan Building Act*, 1855.[3]

(L) *The Absconding Debtors' Act*, 1851.[4]

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[1] *Order for Warrant of Execution to issue under the Friendly Societies and other Acts.*

No. [*of Plaint*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of 18 it was ordered by the said court that [*here insert the terms of the order of the court*]:

And it was then further ordered, That if the defendant should not obey the terms of such order, that he should pay to the registrar of the court, on or before the day of the sum of pounds, by way of penalty:

And whereas it appears to the court that the defendant has not obeyed either of the said orders, although demand on that behalf was duly made upon him:

It is therefore ordered, That a warrant of execution issue for the said sum, being the amount of such penalty and the costs thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

Warrant of Execution against the Goods under the Friendly Societies and other Acts.

No. [*of Plaint*].

No. [*of Warrant*].

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of 18 it was ordered by the said court that [*here insert the terms of the order of the court*]:

And it was then further ordered, That if the defendant should not obey the terms of such order, that he should pay to the registrar of the court, on or before the day of 18 the sum of pounds, by way of penalty and costs:

And whereas the defendant has not obeyed either of the said orders: These are therefore to require and order you forthwith to make and levy, by distress and sale of the goods and chattels of the defendant, wheresoever they may be found within the district of this court (excepting the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount of such penalty and costs, including the costs of this execution, and also to seize and take any money or bank-notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant which may be there found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the registrar of the court, and make return of what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the court this day of 18

By the Court.

Registrar of the Court.

To the High-Bailiff of the said Court, and others the Bailiffs thereof.

	£	s.	d.
Amount ordered to be paid . . .			
Costs			
Poundage for issuing this warrant			
Total amount to be levied £			

Notice.— The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the said defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 18

[2] Rule 193. "In the proceedings in the county courts under s. 50 of 16 & 17 Vic. c. 51, a plaint shall be entered, and a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable."

For proceedings under the Succession Duty Act, 1853, the same fees shall be taken as upon the entry and hearing of a plaint in the county court, regard being had to the amount in dispute. Table of 21st Nov. 1856.

The fees must not be estimated on more than 20*l*. (Id.)

[3] Rule 194. "In proceedings in the county courts under 18 & 19 Vic. c. 122, a plaint shall be entered and a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable."

[4] R. 195. "Where a warrant shall have been

(M) *Form and Nature of Security in the County Courts.*

(*a*) *Is in Form of a Bond.*[1]

How securities under County Court Acts to be given and enforced.

19 & 20 Vic. c. 108, s. 70, enacts, "where by this act, or any act relating to the county courts, a party is required to give security, such security shall be at the cost of the party giving it, and in the form of a bond, with sureties to the other party, or intended party, in the action or proceeding: Provided always, that the court in which any action on the bond shall be brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond."

(*b*) *Deposit in Lieu of Security.*

Deposit may be made in lieu of security.

19 & 20 Vic. c. 108, s. 71, enacts, "that where by this act, or any acts relating to the county courts, a party is required to give security, he may in lieu thereof deposit with the registrar, if the security is required to be given in a county court, or with the master of the superior court if the security is required to be given in such court, a sum equal in amount to the sum for which he would be required to give security, together with a memorandum, to be approved of by

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granted to the high-bailiff of a county court under the Absconding Debtors' Act, 1851, such high-bailiff shall not be required to execute the same out of the district of the court for which he shall have been appointed high-bailiff; but if the person against whom such warrant shall have been granted cannot be found within the district of the court by the judge of which it shall have been granted, such high-bailiff shall forthwith transmit such warrant to the high-bailiff of any other county court within the district of which such party shall then be, or be believed to be, and thereupon such last-mentioned high-bailiff shall be authorised and required to execute such warrant, and otherwise to act in the matter in all respects as if the warrant had been directed to him by the judge of the court of which he is the high-bailiff."

[1] If any bond given under the provisions of any act relating to the county courts shall have been registered in the Court of Common Pleas in England, and the condition of such bond shall have been satisfied, the Commissioners of her Majesty's Treasury, by certificate under the hands of any two of them, may authorise the proper officer of the said court to enter up satisfaction on the record of such bond or obligation. 19 & 20 Vic. c. 108, s. 76.

The 9 & 10 Vic. c. 95, s. 127, enacts, "that every bond given on the removal of any action out of the county court, or upon staying the execution of any warrant of possession, or on moving for a new trial, or to set aside a verdict, judgment, or nonsuit, shall be made to the other party to the action at the costs of such other party, and shall be approved by the judge, and attested under the seal of the court; and if the bond so taken be fortified, or if, upon the proceeding for securing which such bond was given, the judge before whom such proceeding shall be had shall not certify upon the record in court that the condition of the bond hath been fulfilled, the party to whom the bond shall have been so made may bring an action of debt, and recover thereon: Provided always, that the court in which such action as last aforesaid shall be brought may, by a rule of court, give such relief to the parties liable upon such bond as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeasance to such bond."

Rule 134. "In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party, and the registrar at his office, notice of the proposed sureties, in the form set forth in the schedule; and the registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that, should he have any valid objection to make to the sureties, or either of them, that it must then be made."

R. 135. "The sureties shall make an affidavit of their sufficiency before the registrar, in the form in the schedule, unless the opposite party shall dispense with such affidavit." *See* 31 L. J. Q. B. 14; 5 L. T. (N. S.) 210.

R. 136. "The bond shall be executed in the presence of a judge or registrar, or some other of the persons mentioned in sect. 58 of 9 & 10 Vic. c. 108: Provided always, that if it be executed in the presence of the judge or registrar, it shall not be necessary for it to be attested."

R. 137. "Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made."

R. 138. "In all cases where the security is by bond, the bond shall be deposited with the registrar until the cause is finally disposed of."

such registrar or master, and to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar or master shall give to the party paying a written acknowledgment of such payment; and the judge of the county court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just."

(N) *Recovery of Fines.*[1]

(O) *In Bankruptcy.* *See* vol. ii. Bankruptcy, App. i.

(P) *In Probate Cases.* *See* Probate; Will.

XII. Of County-Court Appeals.

(A) *In cases exceeding 20l., either Party may Appeal to the Superior Courts on giving Security.*

In cases exceeding 20*l.* either party may appeal to the superior courts upon giving security.

13 & 14 Vic. c. 61, s. 14, enacts, "if either party in any cause of the amount to which jurisdiction is given to the county courts by this act[2] shall be dissatisfied with the determination or direction of the said court in point of law,[3] or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior courts of common law at Westminster:[4] Provided that such party shall, within ten days[5] after such determination or direction, give notice of such appeal to the other party, or his attorney,[6] and also give

[1] 9 & 10 Vic. c. 95, s. 87, provides, "that payment of any fine imposed by any court under the authority of this act may be enforced upon the order of the judge, in like manner as payment of any debt adjudged in the said court, and shall be accounted for as herein provided."

[2] Where the demand exceeds 20*l.*, and does not exceed 50*l.*, see *Blowers v. Rackham*, 20 L. J. Q. B. 397.

If the cause of action exceed 20*l.*, an appeal lies, though the judgment be for a sum under 20*l.* In such a case, when the plaint is brought, it is a case in which an appeal lies, and the improper decision of the judge upon some point of law, as, for instance, by the exclusion of evidence which ought to have been admitted, may have been the cause of the judgment being under 20*l.* *Dreesman v. Harris*, 9 Ex. 485; 23 L. J. Ex. 210. But in order to ascertain what is the sum for which the plaint is brought, the sum claimed in the plaint is not necessarily conclusive, but regard ought to be had to that sum which might be lawfully recovered under the plaint. *Mayer v. Burgess*, 4 E. & B. 655; 24 L. J. Q. B. 67.

The right of appeal applies to judgments, and not to the decision of the judge on a collateral point of law during the trial. It does not extend to orders of commitment under 9 & 10 Vic. c. 95, s. 99. *Rackham v. Blowers*, 15 Jur. 758.

[3] There is no appeal on a question of fact; but it lies on a point of law, notwithstanding the judge may have acted without a jury. *East Anglian Railway Co. v. Lythgoe*, 10 C. B. 726; 20 L. J. C. P. 84. *Borthwick v. Walton*, 15 C. B. 501; 24 L. J. C. P. 83. See *Cuthbertson v. Parsons*, 12 C. B. 304; 21 L. J. C. P. 165.

The appeal will lie where the judge decides without a jury, if it appears, on the case stated on appeal, that he decided on an erroneous view of the law, notwithstanding there may be evidence which would support his finding. *Robins v. Todd*, 6 W. R. Ex. 466.

There is no right of appeal from the direction of a county-court judge as to the taxation of costs, on the higher or lower scale, under the 13 & 14 Vic. c. 61, s. 14. *Carr v. Stranger*, 22 Jur. 439; 31 L. T. 96.

[4] The court of appeal constituted by this section consisted of two or more of the puisne judges sitting out of term. But by the 2d sec. of 15 & 16 Vic. c. 54, they "shall be heard and determined in term by the judges thereof, as part of the ordinary business of such courts, or out of term by any two or more of the judges of the said superior courts, sitting as a court of appeal for that purpose."

[5] Rule 140. "The ten days, within which notice of appeal may be given, shall be reckoned exclusive of the day of trial." *See* 27 L. J. Q. B. 319; 28 id. Ex. 131. Where there has been a motion for a new trial reserved, the time computed from refusal, not from day of trial. 30 L. J. Ex. 263.

[6] R. 141. "The notice of appeal shall be in writing, and shall state the grounds on which the party appeals, and shall be signed by the appellant, his attorney or agent; and such notice shall be sent to the registrar, as well as to the successful party, by post or otherwise."

R. 142. "If, before the notice of appeal is

security,[1] to be approved by the clerk of the court, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment if he be the defendant, and the appeal be dismissed: Provided nevertheless, that such security so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the county court in which such action shall have been tried, and the same shall have been paid accordingly; and the said court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such court may think proper, and such orders shall be final."

(*a*) *Bond where a Plaintiff is Appellant.*[2]

served upon the registrar, execution shall have issued, and the amount of the judgment and costs of execution shall have been paid into the hands of the bailiff, or levied and not paid over to the successful party, the same shall remain in court to abide the order of the court."

Where notice of appeal was given on the 22d, security was given on the 23d, the notice of appeal was withdrawn on the 24th, and on the same day a fresh notice of appeal was given, but no fresh security, it was held that the court had jurisdiction to hear the appeal. *Daniels v. Charsley*, 11 C. B. 740; 21 L. J. C. P. 37.

The plaintiff, in an action against two defendants, served a notice of appeal on all the parties, but it did not state the grounds. He then, within the ten days, served a second notice, stating the grounds, on the registrar and on one of the defendants, and on the tenth day posted to the other defendant the same notice, which, according to the course of the post, ought to have been delivered the same evening, but was not received till the eleventh day. The plaintiff also, within the ten days, attempted to serve the notice upon the defendant's attorney, but the office was shut up (as it was presumed from the affidavits) for the purpose of preventing such service. The parties afterwards went before the county-court judge, who signed a case. On appeal, the respondent protesting that the notice of appeal was insufficient, it was held that the court of appeal had jurisdiction to hear the appeal. *Evans v. Matthews*, 26 L. J. Q. B. 166.

It cannot be objected to the jurisdiction of the court of appeal that the notice of appeal did not state any grounds of dissatisfaction with the decision of the county-court judge, such statement being required for the information of the court below. *Cannon v. Johnson*, 21 L. J. Q. B. 164.

By rule 139, "any party dissatisfied with the determination or direction of the court in point of law, or upon the admission or rejection of evidence, may, before the rising of the court on the day on which judgment was pronounced, deliver to the registrar a statement in writing, signed by him, his counsel or attorney, containing the grounds of his dissatisfaction; and in the event of no such statement being delivered, the successful party may proceed on the judgment, unless the judge shall otherwise order: but the judge may direct proceedings to be taken on the judgment, notwithstanding such statement has been delivered: Provided that the party so dissatisfied may appeal on grounds different from those contained in such statement, and although he shall not have delivered any such statement."

[1] The giving of security for costs of appeal within the time specified is a condition precedent to the right to have the appeal heard.

Unless the condition of giving security be complied with, the court will not hear the appeal. *Stone v. Dean*, 22 Jur. 534.

Rule 143. "If, before an appealing party shall have given the required security, execution shall have issued, the registrar shall, upon the appealing party's giving security, forthwith send notice thereof, by post or otherwise, to the bailiff; and proceedings on such execution shall forthwith be stayed."

R. 144. "At the time of giving security the appellant shall deliver to the registrar a statement in writing, showing to which of the courts of common law at Westminster he proposes to appeal."

[2] *Bond where a Plaintiff is Appellant.*

Know all men by these presents, that we, A. B. of, &c., C. D. of, &c., and E. F. of, &c., are jointly and severally held and firmly bound to G. H. of, &c., in £ to be paid to the said G. H., or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred

Whereas an action is now depending in the county court of holden at wherein the above-bounden A. B. is plaintiff and the above-named G. H. is defendant: And whereas the said action came on to be tried in the said court on the day of when a judgment was given for the said G. H.: And whereas the said A. B., being dissatisfied with such judgment, gave due notice to the said G. H. of his the said A. B.'s intention to appeal from the same to her Majesty's Court of at Westminster, according to

(*b*) *Bond where Defendant is Appellant.*[1]

(B) *Appeal in Actions of Replevin and Proceedings in Interpleader, and for Recovery of Tenements, and where Parties agree that Court should have Jurisdiction.*

Appeal in actions of replevin and proceedings in interpleader, and for reco-

By 19 & 20 Vic. c. 108, s. 68, "an appeal from the decision of a county court, on the same grounds and subject to the same conditions as are provided by the 14th sect. of the 13 & 14 Vic. c. 61, shall be allowed in all actions of replevin where the amount of rent or damage exceeds twenty pounds, and in all actions for the recovery of the tenements where the yearly rent or value of

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the statute in such case made and provided: And whereas it is thereby provided that the party who shall appeal as aforesaid shall give security, to be approved of by the registrar of the court aforesaid, for the costs of the appeal, whatever be the event thereof: And whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation for the purposes aforesaid, and the security intended to be hereby given has been approved of by the registrar of the said county court, as appears by his allowance in the margin hereof:*

Now the condition of this obligation is such, that if the above-bounden A. B., C. D., and E. F., any or either of them, shall pay unto the said G. H., his executors, administrators, or assigns, the costs of the said appeal, as the said court of appeal shall order, then this obligation shall be void, otherwise shall remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by
the above-bounded in the presence
of

Note.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.

[1] A sum sufficient to cover the costs of appeal, say 20*l.*, being double the estimated amount, and also double the amount of judgment.

Bond where Defendant is Appellant.

Know all men by these presents, that we, A. B. of, &c., and C. D. of, &c., and E. F. of, &c., are jointly and severally held and firmly bound to G. H. of, &c., in £ to be paid to the said G. H. or his certain attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each and every of us, in the whole, our, and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and sixty

Whereas an action is now depending in the county court of holden at wherein the above-named G. H. is plaintiff and the above-bounden A. B. is defendant: And whereas the said action came on to be tried in the court on the day of last, when a judgment was given for the said G. H. in the sum of £ : And whereas the said A. B., being dissatisfied with such judgment, gave due notice to the said G. H. of his the said A. B.'s intention to appeal from the same to her Majesty's Court of at Westminster, according to the statute in such case made and provided: And whereas it is thereby provided, that the party who shall appeal as aforesaid shall give security, to be approved of by the registrar of the court aforesaid, for the costs of the appeal, whatever be the event thereof; and also for the amount of the judgment, if such party be the defendant and the appeal be dismissed: And whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, for the purposes aforesaid, and the security intended to be hereby given has been approved of by the registrar of the said county court, as appears by his allowance in the margin hereof:* Now the condition of this obligation is such, that if the above-bounden A. B., C. D., and E. F., any or either of them, shall pay unto the said G. H., his executors or administrators, the costs of the said appeal, as the said court of appeal shall order, and shall also, in case the said appeal shall be dismissed, pay to the said G. H., his executors, administrators, and assigns, the said sum of £ [*amount of the judgment—to be omitted if amount previously paid into court*], then this obligation shall be void, otherwise shall remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by
the above-bounden in the presence
of

Note.—If a deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp.

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* I approve of this bond. J. K., Registrar. (L.S.)
This bond requires a stamp.

very of tenements, and where parties agree that court should have jurisdiction.

the premises exceeds twenty pounds, and in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds twenty pounds,[1] and in all actions where the party agree that the court shall have jurisdiction.

(*a*) *Agreement not to Appeal.*[2]

Parties may agree not to appeal.

By 19 & 20 Vic. c. 108, s. 69, "no appeal shall lie from the decision of a county court, if before such decision is pronounced both parties shall agree in writing, signed by themselves or their attornies or agents, that the decision of the judge shall be final; and no such agreement shall require a stamp."

(1) *Form of Agreement not to Appeal.*[3]

(C) *Of the Case on Appeal.*

Appeal to be in the form of a case agreed on by both parties, but if they cannot agree judge to settle and sign it.

13 & 14 Vic. c. 61, s. 15. "And be it enacted, that such appeal shall be in the form of a case agreed on by both parties or their attornies, and if they cannot agree the judge of the county court, upon being applied to by them or their attornies, shall settle the case and sign it;[4] and such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought." *See* 23 L. J. Ex. 5, 129.

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[1] Before the statute there was no appeal from the decision of a judge on an interpleader summons. *Beswick v. Baffey*, 9 Ex. 315; 23 L. J. Ex. 89. *Fraser v. Fothergill*, 14 C. B. 295; 23 L. J. C. P. 53.

[2] Previous to this statute there was no appeal where jurisdiction was dependent on the consent of the parties. *Groves v. Janssens*, 9 Ex. 481; 23 L. J. Ex. 91.

[3] *Agreement under sect.* 69 *of* 19 *&* 20 *Vic. c.* 108.

In the County Court of holden at
Between A. B. plaintiff,
and
C. D. defendant.

We [*or* the respective attornies or agents of the above-named plaintiff and defendant] do hereby, under the provision of sect. 69 of 19 & 20 Vic. c. 108, agree that the decision of the judge of this court in this action shall be final.

Given under our hands this day of
Plaintiff [*or* attornies].
Defendant [*or* attornies].

[4] R. 145. "All cases of appeal shall, unless the judge shall otherwise order, be presented to him for signature, at the court holden next after the expiration of twelve clear days from the day on which the judgment was pronounced, and shall then be signed by the judge and be sealed with the seal of the court; and when signed and sealed, one copy thereof shall be deposited with the registrar, and another sent by post or otherwise by the appellant to the successful party, within three clear days next after the time of signing and sealing the same; and if the appellant do not comply with this rule, the successful party may proceed on the judgment, unless the judge shall otherwise order."

The 145th rule does not deprive a party of his right of appeal if he do not comply with its provisions, but only prevents its being turned into a means of delay. *Hacking v. Lee*, 29 L. J. Q. B. 204. *See* 9 Ex. 475.

A county-court judge having given judgment on an interpleader summons in favour of the defendant, the claimant gave due notice of appeal, and ultimately a case was agreed to between the parties, and signed by the attornies on both sides. This case was presented to the judge to sign, several months after the hearing, and he declined to sign it on account of the lapse of time, and also on the ground that he did not consider it involved any point of law. A summons was taken out at chambers, calling on the county-court judge and the defendant to show cause why the former should not sign the case. No affidavit was in existence at the time this summons was taken out, but afterwards, and before it was served, affidavits of the facts were sworn and filed. The county-court judge did not attend the summons, and an order was made requiring him to sign and seal the case:—*Held*, that the enactment of the 19 & 20 Vic. c. 108, s. 47, if it rendered an affidavit necessary when a summons is taken out at chambers, did not make the want of it more than an irregularity, and that the order was good notwithstanding. *Furber v. Sturmey*, 6 W. R. 625; 31 L. T. Ex. 183.

As to the effect of the death of the judge, after notice of appeal and before the case is signed, see *M'Allum v. Cookson*, 28 L. J. C. P. 1.

The judges of the superior courts are empowered to make orders regulating appeals. 15 & 16 Vic. c. 54, s. 3.

(*a*) *Form of Case on Appeal.*[1]

(*b*) *Transmission of Copies of Case.*[2]

(D) *On Default in prosecuting Appeal, successful Party may apply for leave to proceed on the Judgment.*[3]

(E) *The Argument in the Court of Appeal.*[4]

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[1] *Case on Appeal.*

In the County Court of holden at
[*Seal.*]
On appeal to the Court of
Between A. B. plaintiff,
and
C. D. defendant.

This is an action [*here state the cause of action and the facts*].

The question for the opinion of the court of is: First [*here state the question for the opinion of the court*].

[2] R. 146. "The appellant shall, within three clear days next after the case is signed and sealed, transmit two copies thereof, by post or otherwise, in conformity with the provisions of sect. 15 of 13 & 14 Vic. c. 61, and notice of such transmission shall forthwith be served on the appellant by the successful party, by post or otherwise; in default whereof the successful party may proceed on the judgment, and shall, on application to the court, be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings: Provided that, instead of proceeding on such judgment the respondent, if he think fit, may, within twenty-eight clear days from the signing of the case, transmit it in the manner prescribed, and give the like notice to the appellant of such transmission."

[3] R. 147. "If, after the case has been transmitted, the appellant do not prosecute his appeal with due diligence, according to the practice of the court of appeal, the successful party may apply to the judge for leave to proceed on the judgment, and leave for that purpose may be granted accordingly, if the judge shall think fit; and the successful party shall also be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings; which costs shall be added to the judgment."

[4] The court of appeal will not entertain objections which were not taken in the county court, in analogy with the ordinary practice on applications for new trials in the superior courts. *Yorke v. Smith*, 21 L. J. Q. B. 53. *Cannon v. Johnson*, id. 164. *Watson v. The Ambergate Railway Co.* 15 Jur. Q. B. 448; 17 L. T. 125.

Only one counsel on each side is heard. The appellant begins, the respondent is then heard, and the appellant is entitled to a reply.

The case will be construed with the same degree of strictness as a case sent from sessions. *Smith v. York*, 16 Jur. 63. The parties are bound by the case. The observations of the county-court judge in giving judgment, not stated in the case, cannot be imported into it, or referred to, either as finding a fact or as giving a reason for the judgment. *Watson v. The Ambergate Railway Co. supra. Ward v. Redifer*, 6 W. R. 326; 31 L. T. 164.

A county-court judge, in settling a case for appeal, directed that a certain document should be inserted, and signed the rough draft, which was also sealed with the seal of the court. He afterwards refused to sign the fair copy of the case containing the omitted document, thinking he was *functus officio*. It was held that he had authority, and ought to sign the perfect case. *Figg v. Wilkinson*, 9 Ex. 475; 23 L. J. Ex. 129.

Where judgment has been given for the plaintiff in the county court, the court of appeal may order a nonsuit to be entered. *Fuller v. Clevely*, 17 Jur. 736; 20 L. T. 278. But where the case had been tried by a jury, and the appeal was on the ground of the wrongful reception of evidence, the court of appeal said they had no power to order the verdict to be entered for the defendant, and that they could only order a new trial. *Jonas v. Adams*, 20 L. J. Q. B. 397.

Where the case has been tried by the judge without a jury, and questions of fact and law were in dispute, an appeal will lie, if the court can see from the statement of the case that the judge, in order to arrive at his judgment, must have decided a question of law in a particular way; or, if drawing any inferences from the matters of fact and the evidence as stated in the case which could properly be drawn, the judgment could not have been arrived at without an error in point of law, the court of appeal will reverse the decision. *Cuthbertson v. Parsons*, 21 L. J. C. P. 165. *British Industry Life Assurance v. Ward*, 17 C. B. 644. But if the decision can be supported on any view of the facts stated in the case which does not render it necessary to conclude that the judge has determined the particular point of law in the way complained of as erroneous, the appeal will be dismissed. *Cawley v. Furnell*, 12 C. B. 291; 20 L. J. C. P. 197.

The court of appeal is not limited to answering the questions put in the case, but it may look to the direction of the judge to the jury set out in the case; and if that is erroneous, order a new trial. *Stancliffe v. Clarke*, 7 Ex. 439; 21 L. J. Ex. 129.

Where a new trial is ordered, either party may require that the second trial shall be had before a jury, notwithstanding the former trial was before the judge alone. *Reg. v. Harwood*, 22 L. J. Q. B. 127.

(F) *Costs of Appeal.*[1]

(G) *Proceedings on the Judgment of the Court of Appeal.*[2]

XIII. Of the Controlling Jurisdiction of the Superior Courts, and of the Removal of Proceedings into the Superior Courts.

(A) *Of Prohibition to Stay Proceedings in the County Courts.*

(*a*) *Application for Prohibition.*

Judges may hear applications for writs of prohibition, either in term or in vacation.

13 & 14 Vic. c. 61, sect. 22. "That it shall be lawful for any judge of any of her Majesty's superior courts of common law at Westminster, as well in term time as in vacation, to hear and determine applications for writs of prohibition directed to the judges of the said county courts, and to make such rules or orders for the issuing of such writs as might have been made by the court; and all such rules or orders so made by any such judge shall have the same force and effect as rules of court for such purposes now have, and such writs shall be issued by virtue of such rules or orders as well in term time as in vacation: Provided always, that any rule or order made by any such judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the court, on application made thereto by any party dissatisfied with such rule or order."[3]

The court of appeal has authority, if the case is insufficiently stated, to send it back to the county-court judge, in order that it may be amended by the addition of omitted facts, or otherwise. *Great Northern Railway Co. v. Shepherd*, 21 L. J. Ex. 114. *Smith v. Douglas*, 16 C. B. 31. *See* vol. i. Amendment.

[1] The rule upon which the courts act in all cases where there are no exceptional circumstances which render its application inequitable or inconvenient, is to give the costs of the appeal to the party who succeeds upon the appeal, whether it be decided in favour of the appellant or the respondent. It was at first made a question whether the respondent should be compelled to pay costs where the appeal was affirmed, seeing that he comes before the court to support a judgment in his favour; but it was finally determined that he ought, notwithstanding, to be liable for the costs, since, if the appellant was not to have the costs when the judge is wrong, the effect would be a denial of justice in the county court, the costs of the appeal being often more important in amount than the debt itself. Marshall on Costs, 423. *Robinson v. Lawrence*, 7 Ex. 123. *Foster v. Smith*, 18 C. B. 161. *Gibbon v. Gibbon*, 13 C. B. 219. *Leidman v. Schultz*, 14 C. B. 52. *Daniels v. Charsley*, 11 C. B. 739. *Outhwaite v. Hudson*, 7 Ex. 381.

The rule that the costs will follow the result is not, however, inflexible; it may be relaxed in cases of vexation. Where the case was stated in the first instance ambiguously, and after being sent back to be amended was stated in terms which showed the finding to be on the facts, the court dismissed the appeal without costs, saying the fault was in the judge. (*London & North Western Railway Co. v. Grace*, 21 C. B. (N. S.) 555); and where a new trial is directed on the ground of mis-direction, costs will not be given to the appellant. 6 H. & N. 211; 30 L. J. Ex. 11.

And where the case on appeal was stated with unnecessary prolixity, setting out a bill and answer, and other proceedings in Chancery, instead of the facts which they were supposed to prove, whereby the costs of the appeal were very improperly increased, the court ordered the judgment to be reversed with costs, being satisfied there was blame on the appellant for the prolixity so introduced. *Evans v. Matthias*, 7 E. & B. 590. As to costs in the court below, *see ante*.

[2] R. 148. "When the court of appeal has pronounced judgment, either party may deposit the original order of the court of appeal, or an office copy thereof, with the registrar of the county court, and within forty-eight hours from the time of such deposit send a notice thereof to the other party, by post or otherwise."

R. 149. "A new trial, in pursuance of the order of the court of appeal, shall be entered for trial at the county court which shall be holden next after twelve clear days from the time when such order or office copy thereof shall have been deposited as aforesaid, unless the parties agree that it shall take place sooner, or the judge otherwise order, and it shall be conducted in the same manner as any new trial granted by the county court itself."

R. 150. "If the order of the court of appeal be that judgment shall be entered for either party, then such judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as on a judgment of the county court."

[3] It is not necessary that the judge's order for the prohibition should show the ground upon which the want of jurisdiction arises. *Ex-parte Eversfield*, 6 W. R. 445; 31 L. T. C. P. 100.

(*b*) *Proceedings in Prohibition.*

(1) *The matter is finally disposed of by the Rule or Order.*

Application for writ of prohibition to a judge shall be finally disposed of by rule or order.

By the 19 & 20 Vic. c. 108, sect. 42, "when an application shall be made to a superior court or a judge thereof for a writ of prohibition to be addressed to a judge of a county court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed."

(2) *The granting of the Rule or Summons to show cause why a Writ of* Certiorari *or Prohibition should not issue is, if so directed, a Stay of Proceedings.*

Rule or summons to show cause why a writ of *certiorari* or prohibition should not issue to be a stay of proceedings.

19 & 20 Vic. c. 108, sect. 40. "The granting by any of the superior courts, or by any judge thereof, of a rule or summons to show cause why a writ of *certiorari* or prohibition should not issue to a county court, shall, if the superior court or a judge thereof so direct, operate as a stay of proceedings in the cause to which the same shall relate until the determination of such rule or summons, or until such superior court or judge shall otherwise order, and the judge of the county court shall from time to time adjourn the hearing of such cause to such day as he shall think fit, until such determination or until such order be made; but if a copy of such rule or summons shall not be served by the party who obtained it on the opposite party, and on the registrar of the county court, two clear days before the day fixed for the hearing of the cause, the judge of the county court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior court or a judge thereof shall have made some order respecting such costs."

(3) *Notice must be sent to the Registrar.*

Notice of writ of *certiorari* or prohibition having been obtained to be sent to registrar.

19 & 20 Vic. c. 108, sect. 41. "Where a writ of *certiorari* or of prohibition, addressed to a judge of a county court, shall have been granted by a superior court or a judge thereof, on an *ex-parte* application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party that it has issued, two clear days before the day fixed for hearing the cause to which it shall relate, the judge of the county court may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the superior court or a judge thereof shall have made some order respecting such costs."

(i) *Form of Order for Costs of the Day, in case of Default.*[1]

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[1] *Order for Costs of the Day under sect.* 40 *of* 19 *&* 20 *Vic. c.* 108.

No.

In the County Court of holden at

[*Seal.*]

Between A. B. plaintiff,
and
C. D. defendant.

Whereas a rule [*or* summons] has been granted by [*name of superior court or judge*] requiring cause to be shown why a writ of *certiorari* [*or* prohibition] should not issue in this cause, and no order has been made by such court [*or* judge] respecting the costs in this court: And whereas a copy of such rule or summons has not been served on the plaintiff [*or* defendant] [*or* on the registrar] according to sect. 40 of 19 & 20 Vic. c. 108: And whereas the plaintiff [*or* defendant] has on this day appeared at this court to prosecute [*or* defend] this cause: It is ordered, that the defendant [*or* plaintiff] do pay the sum of £ for the plaintiff's [*or* defendant's] costs of the day; and it is ordered that the defendant [*or* plaintiff] do pay the same to the registrar of the court on this day of 18

Given under the seal of the court this day of

By the Court,
Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*] from ten till four except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

(ii) *In what cases Prohibition will issue.*[1]

(*a*) *Form of Writ of Prohibition.*[2]

[1] If the county court has no jurisdiction over the cause of action, the defendant is not precluded by acquiescence from obtaining a prohibition. *Jones v. Owen*, 5 D. & L. 669; 18 L. J. Q. B. 8. *Thompson v. Ingham*, 14 Q. B. 710. *Marsden v. Wardle*, 3 E. & B. 695; 23 L. J. Q. B. 263. But if a total want of jurisdiction does not appear, if the defendant takes the chance of a verdict in his favour, and makes no objection to the jurisdiction until after judgment, it will be too late to apply for a prohibition. *Yates v. Palmer*, 6 D. & L. 283. It is not, however, an objection that the defendant has not first applied to the county-court judge to stay the proceedings. *Sewell v. Jones*, 19 L. J. Q. B. 372. And even consent to a reference of the cause to arbitration does not preclude the party from afterwards applying for a prohibition on the ground of want of jurisdiction. *Knowles v. Holden*, 24 L. J. Ex. 223. If the defendant has not been guilty of any unnecessary delay, a prohibition may issue, even after execution. *Jones v. Owen*, 5 D. & L. 669; 18 L. J. Q. B. 8. *Marsden v. Wardle*, 3 E. & B. 695; 23 L. J. Q. B. 263.

A prohibition will issue in case of any excess of jurisdiction, as where a county-court judge, after his authority with reference to an application for a new trial is exhausted by its exercise, a second time entertains an application for the same new trial (*Great Northern Railway Co. v. Mossop*, 25 L. J. C. P. 22); or if, after having given judgment for the defendant in open court on a subsequent day, he afterwards, of his own motion, and in private, alter such judgment. *Jones v. Jones*, 17 L. J. Q. B. 170. But to justify a prohibition, there must be a clear excess of jurisdiction; a mere mistake or error, be it ever so manifest, committed by a judge acting within his authority, affords no ground for interference. "A writ of prohibition," said *Coleridge, J.*, "never issues merely because a step taken in the court below may have been unwise or unjust, nor because we may think a decision unsatisfactory; but only because we find that the court has exceeded, or is about to exceed, its jurisdiction." *Zohrab v. Smith*, 17 L. J. Q. B. 174. See *Toft v. Rayner*, 5 C. B. 162; 17 L. J. C. P. 16. *Robinson v. Lenaghan*, 2 Ex. 333; 17 L. J. Ex. 174. *Waters v. Handley*, 1 Cox & Mac. 139. *Foster v. Temple*, 17 L. J. Q. B. 230; 5 D. & L. 230. *See* also *Ex-parte Smyth*, 3 Ad. & E. 719. *Lexden Union v. Southgate*, 10 Ex. 201; 23 L. J. Ex. 316. *Ex-parte Summers*, 18 Jur. 522. Therefore, if the judge receives improper evidence, the superior court cannot restrain him on a representation that he has not acted strictly legally in receiving that which he has jurisdiction to entertain; for the power being given to the court to decide in determining the question, it exercises a discretion with which it is invested. *Winsor v. Dunford*, 12 Q. B. 603; 18 L. J. Q. B. 14. See *Toft v. Rayner*, *supra*. So where the construction of a statute is within the jurisdiction of the county-court judge, a prohibition cannot issue on a suggestion that his construction was erroneous. *Re Bowers*, 15 Jur. 1196. *Ellis v. Watt*, 19 L. J. C. P. 113.

Where a summons was issued in which the defendant was described as executor of William Thompson, whereas he was described in the plaint as executor of William Taylor, the judge of the county court having dismissed the summons, and directed a fresh one to issue in order to save the Statute of Limitation, a prohibition was refused, and *Patteson, J.*, said that "the first summons, which varied from the plaint, and was dismissed, was no summons at all." *Foster v. Temple*, 17 L. J. Q. B. 230.

Where the defendant was summoned for a debt for 20*l.* "for illegally practising as an apothecary," and the particulars stated that the action was brought to recover 20*l.* for that, after the 55 Geo. 3, c. 194, the defendant on divers days acted as an apothecary without a certificate at, &c. (places named), by attending and supplying medicines to four persons mentioned, whereby the defendant had forfeited the sum of 20*l.* By the 55 Geo. 3, c. 194, any person who shall practise as an apothecary without a certificate shall forfeit for every such offence 20*l.* It was held on motion for a prohibition that, whether the facts stated in the particulars amounted to four offences or one only, the sum recoverable was limited by the summons to 20*l.*, and, therefore, the county court had jurisdiction. *Re Apothecaries' Co. v. Burt*, 5 Ex. 363.

In *Byrne v. Knipe*, 5 D. & L. 659, 18 L. J. Q. B. 33, a prohibition was applied for on the ground that an action was pending in the Court of Exchequer in respect of the same matter; but *Patteson, J.*, discharged the rule, as it did not appear that the causes of action were, in fact, identical. And in another case, where a plaint in tort claiming 20*l.* damages was removed into the superior court, and afterwards the plaintiff entered another plaint in respect of the same tort claiming 5*l.* damages, a prohibition was denied upon the undertaking of the plaintiff not to proceed in the first suit. *Edwards v. Rogers*, 19 L. J. Ex. 149.

[2] The following is a form of

Writ of Prohibition where Title is in Question.

The Queen, to A. B. Esq., Judge of the County Court of holden at greeting.

C. D. of &c. hath shown to us that E. F. of &c. hath entered a plaint against him the said C. D. in an action of [*trespass*] in the county court of holden at

(*b*) *Order for Costs of the Day where there has been Default in sending Notice to Registrar.*[1]

(iii) *Costs of Application.*[2]

(B) *Certiorari to Remove Proceedings from the County Courts.*[3]

before you, and it hath been shown to us that the said plaint will raise a question of title to a hereditament, and is not within your jurisdiction:

We therefore prohibit you from proceeding further with the said plaint, and we command you that you altogether surcease from holding the plea aforesaid, the premises aforesaid anywise concerning.

Witness, &c.

[1] *Order for Costs of the Day under sect.* 41 *of* 19 & 20 *Vic. c.* 108.

No.

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

Whereas a writ of *certiorari* [*or* prohibition] has been granted in this cause by [*name of superior court or judge*] on the *ex-parte* application of the defendant [*or* plaintiff], who has not lodged it with the registrar of the court [*or* has not given notice to the plaintiff *or* defendant] that it has issued two clear days before this day, being the day fixed for hearing this cause: And whereas the said [*superior court or judge*] has made no order respecting the costs of the cause in this court: And whereas the plaintiff [*or* defendant] has on this day appeared at this court to prosecute [*or* defend] this cause: It is ordered that the defendant [*or* plaintiff] do pay the sum of £ for the plaintiff's [*or* defendant's] costs of the day; and it is ordered that the defendant [*or* plaintiff] do pay the same to the registrar of the court on the day of 18

Given under the seal of this court this day of 18

By the Court.

Registrar of the Court.

Hours of attendance at the office of the registrar [*place of office*], from ten till four, except on [*here insert the day on which the office will be closed*], when the office will be closed at one.

[2] *As to the Costs.*—If the rule for a prohibition is made absolute, it is not usual to give costs. *Barnes v. Marshall*, 21 L. J. Q. B. 388. *Jones v. Jones*, 17 id. 170. But if the rule be discharged, the party showing cause will in general be allowed his costs. *Lloyd v. Jones*, 17 L. J. C. P. 206.

[3] The 13 & 14 Vic. c. 61, s. 16, enacts, "that no judgment, order, or determination given or made by any judge of a county court, nor any cause or matter brought before him or pending in his court, shall be removed by appeal, motion, writ of error, *certiorari*, or otherwise, into any other court whatever, save and except in the manner and according to the provisions hereinbefore mentioned." *See* ss. 14 & 15.

The meaning of the 16th section is that no *certiorari* shall issue save and except in the manner and according to the provisions of 9 & 10 Vic. c. 95; it did not impose any further restriction upon the removal of causes by *certiorari*. *Mungean v. Wheatley*, 6 Ex. 88; 20 L. J. Ex. 108. *Brookman v. Wenham*, 20 L. J. Q. B. 278. *See* stat. *post*, p. 436.

A *certiorari* will not issue to remove interpleader proceedings. *Ex-parte Summers*, 18 Jur. 522. *See ante*, p. 406.

A plaint was brought in the county court against a justice of the peace for an act done in his office. Within six days after the service of the plaint he gave notice, under the 11 & 12 Vic. c. 44, s. 10, that he objected to being sued in the county court. That statute enacts, that where such notice is given, "all proceedings had in such county court in any such action shall be null and void:"—*Held*, that the plaint could not afterwards be removed by *certiorari*. *Western v. Sneyd*, 1 H. & N. 703; 26 L. J. Ex. 161.

The Crown, by virtue of its prerogative, is entitled to remove a plaint from the county court, notwithstanding it be for less than 5*l*. *Mountjoy v. Wood*, 1 H. & N. 58.

A *certiorari* may issue by order of a judge of the superior courts to remove a judgment in the county court for a sum exceeding 20*l*., exclusive of costs, where the judge is satisfied that the judgment debtor has no goods which can be conveniently taken to satisfy the county-court judgment. 19 & 20 Vic. c. 108, s. 49. *See ante*, p. 393.

When any superior court, or a judge thereof, shall have refused to grant a writ of *certiorari* or of prohibition to be addressed to a judge, or a rule or order requiring the judge or officer to perform a duty of his office, no other superior court or judge thereof shall grant such writ, or rule, or order; but nothing herein shall affect the right of appealing from the decision of the judge of the superior court to the court itself, or prevent a second application being made for such writ, or rule, or order to the same superior court, or a judge thereof, on grounds different from those on which the first application was founded. 19 & 20 Vic. c. 108, s. 44.

The granting of the rule or summons to show cause why a writ of *certiorari* should not issue is, if so directed, a stay of proceedings. 19 & 20 Vic. c. 108, s. 46.

Where granted on an *ex-parte* application, the party who obtained the *certiorari* is bound to lodge it with the registrar, and give notice to the opposite party that it has issued two clear days before the day fixed for hearing the cause, otherwise the county-court judge may order him to pay the costs of the day. 19 & 20 Vic. c. 108, s. 41.

(a) Where the Debt or Damages exceed 5l.

Actions must exceed 5*l.* to be removed into superior courts, and then only by leave.

9 & 10 Vic. c. 95, s. 90, enacts, "that no plaint entered in any court holden under this act shall be removed or removable from the said court into any of her Majesty's superior courts of record by any writ or process, unless the debt or damage claimed shall exceed five pounds, and then only by leave of a judge of one of the said superior courts, in cases which shall appear to the judge fit to be tried in one of the superior courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit."[1]

(b) Removal of Action for Claim not exceeding 5l.

Except with approval of judge of superior court, and upon security given.

19 & 20 Vic. c. 108, s. 38. "Any action commenced in a county court for a claim not exceeding five pounds may be removed by a writ of *certiorari* into a superior court, if such superior court, or a judge of a superior court, shall deem it desirable that the cause shall be tried in such superior court; and if the party applying for such writ shall give security, to be approved of by one of the masters of such superior court, for the amount of the claim, and the costs of the trial, not exceeding in all one hundred pounds, and shall further assent to such terms, if any, as the superior court or judge shall think fit to impose."

(c) Removal of Action of Contract where Claim exceeds 20l., or of Tort where it exceeds 5l., upon the Objection of the Party to the Cause being tried in the County Court.

The defendant may give notice of objection to trial in county court, where claim exceeds 20*l.* &c., and give security for amount claimed and costs; thereupon the proceedings are stayed.[2]

19 & 20 Vic. c. 108, s. 39, enacts, "if in any action of contract the plaintiff shall claim a sum exceeding twenty pounds, or if in any action of tort the plaintiff shall claim a sum exceeding five pounds, and the defendant shall give notice that he objects to the action being tried in the county court, and shall give security, to be approved of by the registrar, for the amount claimed, and the costs of trial in one of the superior courts of common law, not exceeding in the whole the sum of one hundred and fifty pounds, all proceedings in the county court in any such action shall be stayed; but if in any such action the defendant do not object to the same being tried by the county court, or shall fail

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Service of a *certiorari* upon a person acting as clerk at the office of the registrar of the county court where the plaint issued, is good service. *Brookman v. Wenham, supra.*

See further as to the law and practice with respect to writs of *certiorari, ante,* p. 58, *et seq.*

[1] The point was raised in *Bowen v. Evans,* 3 Ex. 111, 18 L. J. Ex. 38, whether the expression that the cause is only to be removed on such terms as the judge shall think fit, necessarily imports that he must hear both parties before he issues the writ, and consequently that the defendant must give notice of his intended application for a *certiorari.* The court held that the application for the writ is an *ex-parte* application, and that there was no necessity for a notice to the opposite party, and that a judge has a perfect right, if he pleases, to issue the writ on an *ex-parte* application. If the judge has been misled by a concealment of material facts, the court will set aside the writ. *Parker v. Bristol and Exeter Railway Co.* 6 Ex. 184.

[2] Rule 60. "A defendant intending to avail himself of the power given by sect. 39 of 19 & 20 Vic. c. 108, to object to an action being tried in the county court, shall give notice personally, or by post, of such intention to the registrar, and to the plaintiff, five clear days before the return day of the summons, according to the form set forth in the schedule, and shall therein name the parties whom he proposes to be his sureties, or state therein his willingness to deposit money in lieu of giving security, or make such deposit before the return day; and if he shall fail to give such notice of his intention to object as aforesaid, he shall not be entitled to object to the action being tried in the county court."

Where the defendant applies for a *certiorari* to remove from the county court a cause in which the demand exceeds 20*l.*, the court will not make it a condition that the defendant, if successful, should not have more costs than if the case had been tried in the county court. *Ex-parte Great Western Railway Co.* 2 H. & N. 557.

On the application of defendants, two plaints involving similar circumstances, on which difficult points of law might arise, were removed by a rule absolute in the first instance, and without the restriction that, if the defendants succeeded, the costs should only be county-court costs, which had been suggested by the judge at chambers to whom

to give the security aforesaid, the county court shall dispose of the cause in the usual way, and the entry of the plaint in such action shall be a sufficient commencement of the suit to prevent the operation of any statute of limitation applicable to such claim: Provided that nothing herein contained shall prevent the removal of any cause from a county court by writ of *certiorari* in the cases, and subject to the conditions in and subject to which such cause may now be removed."

(1) *Form of Notice of Objection.*[1]

(2) „ *Bond.*[2]

(3) *Return of the Writ; Proceedings after Removal; Quashing the Writ;* Procedendo, &c. *See* Certiorari, *ante*, p. 59, *et seq.*

XIV. Proceedings before Justices for Recovery of Penalties.

Penalties, fines, and forfeitures, are recoverable, if not otherwise directed by

9 & 10 Vic. c. 95, s. 130, enacts, "that all penalties, fines, and forfeitures, by this act inflicted or authorised to be imposed (the manner of recovering and applying whereof is not here otherwise particularly directed), shall, upon proof before any justice of the peace having jurisdiction within the county or place where the offender shall reside or be, or the offence shall be committed, either

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the application had in the first instance been made, and who had referred the defendants to the court. *Dowling v. Great Western Railway Co.* 21 Jur. 1130; 30 L. T. Ex. 155.

[1] *Notice of Objection under sect.* 39 *of* 19 *&* 20 *Vic. c.* 108.

No.

In the County Court of holden at

Between A. B. plaintiff,

and

C. D. defendant.

Take notice, That under the provisions of sect. 39 of 19 & 20 Vic. c. 108, I object to this action being tried in the county court, and I propose as my sureties [*here state the full names and additions of the sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets, and numbers, if any; or,* and I propose to deposit a sum of money in lieu of the giving sureties].

Dated this day of 18

To the Registrar of the said Court.

[2] *Bond under sect.* 39 *of* 19 *&* 20 *Vic. c.* 108.

A Sum sufficient to Cover the Amount Claimed, and Costs of Trial, in Superior Courts, not exceeding in the whole 150*l.*

Know all men by these presents that we, A. B., of &c., and C. D., of &c., and E. F., of &c., are jointly and severally held and firmly bound to G. H., of &c., in £ to be paid to the said G. H., or his certain attorney, executors, administrators or assigns, for which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of one thousand eight hundred and

Whereas an action has been brought in the County Court of holden at wherein the above-named G. H. is plaintiff, and the above-bounden A. B. is defendant:

And whereas the said A. B. has given due notice to the said G. H. of his the said A. B.'s objection to the said action being tried in the said court, as provided by sect. 39 of 19 & 20 Vic. c. 108: And whereas it is by the same section of the said statute provided that the party who shall object shall give security, to be approved of by the registrar of the court aforesaid, for the amount claimed, and costs of trial, in one of the superior courts of common law: And whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation for the purposes aforesaid, and the security intended to be hereby given has been approved of by the registrar of the said county court, as appears by the allowance in the margin hereof: Now the condition of this obligation is such that the above-bounden A. B., C. D., and E. F., any or either of them, shall pay unto the said G. H., his executors, administrators, or assigns, the costs of the trial in one of the superior courts of common law, and the amount for which a verdict may pass against the said A. B., then this obligation shall be void, otherwise shall remain in full force.

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

Signed, sealed, and delivered by the above-bounden in the presence of

Note.—If a deposit of money be made, the memorandum thereof shall follow the terms of the condition of the bond, and will not require a stamp.

proceedings before a justice of the peace.

by the confession of the party offending, or by the oath of any credible witness, be levied, with the costs attending the summons and conviction, by distress and sale of the goods and chattels of the party offending, by the warrant under the hand of any such justice; and the overplus (if any), after such penalties, fines, and forfeitures, and the charges of such distress and sale, are deducted, shall be returned, upon demand, unto the owner of such goods and chattels."[1]

XV. Forging the Seal or Process of a County Court is Felony.[2]

COUNTY Gaol.[3]

[1] By sect. 131 of 9 & 10 Vic. c. 95, "if any such penalties, fines and forfeitures respectively, shall not be paid forthwith upon conviction, it shall be lawful for such justice to order the offender so convicted to be detained in safe custody until return can be conveniently made to such warrant of distress, unless such offender shall give sufficient security to the satisfaction of such justice for his appearance before him on such day as shall be appointed for the return of such warrant of distress, such day not being more than eight days from the time of taking any such security, which security such justice shall be empowered to take by way of recognisance or otherwise, as to him shall seem fit."

Sect. 132 enacts, "that if upon return of such warrant it shall appear that no sufficient distress can be had thereupon, or in case it shall appear to the satisfaction of such justice, either by confession of the offender or otherwise, that he hath not within the jurisdiction of such justice sufficient goods and chattels whereon to levy all such penalties, forfeitures, costs, and charges, such justice may, at his discretion, without issuing any warrant of distress, commit the offender to the common gaol or house of correction, for any time not exceeding three calendar months, unless such penalties, forfeitures, and fines, and all reasonable charges attending the recovery thereof, shall be sooner paid and satisfied."

By sect. 133, "the monies arising from any such penalties, forfeitures, and fines, when paid and levied, shall (if not by this act directed to be otherwise applied), be paid to the clerk of the court, and shall be applied in aid of the general fund thereof."

By sect. 134, "in all cases in which by this act any penalty or forfeiture is made recoverable before a justice of the peace, it shall be lawful for such justice to summon before him the party complained against, and on such summons to hear and determine the matter of such complaint, and on proof of the offence to convict the offender, and to adjudge him to pay the penalty or forfeiture incurred, and to proceed to recover the same, although no information in writing shall have been exhibited before him; and all such proceedings by summons, without information in writing, shall be as valid and effectual, to all intents and purposes, as if an information in writing had been exhibited."

By sect. 135, "in all cases where any conviction shall be had for any offence committed against this act, the form of conviction may be in the words or to the effect following, that is to say:—

"Be it remembered, that on this day of in the year of our Lord A. B. is convicted before of her Majesty's justices of the peace for the [*or* before a judge appointed under an act passed in the year of the reign of her Majesty Queen Victoria, intituled, *here insert the title of this act*], of having [*state the offence*]; and I [*or* we] the said do adjudge the said to forfeit and pay for the same the sum of or to be committed to for the space of Given under hand and seal the day and year aforesaid."

Sect. 136. "No order, verdict, or judgment, or other proceeding made concerning any of the matters aforesaid, shall be quashed or vacated for want of form."

[2] 9 & 10 Vic. c. 95, s. 57, enacts, "that for every court holden under this act there shall be made a seal of the court; and all summonses and other process issuing out of the said court shall be sealed or stamped with the seal of the court; and every person who shall forge the seal or any process of the court or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said court, knowing the same to be false, or who shall act or profess to act under any false pretence of the process of the said court, shall be guilty of felony." *See* 24 & 25 Vic. c. 98.

[3] The 5 & 6 Wm. 4, c. 76, s. 114, enacts, "that the treasurer of every county shall send in accounts of all costs arising out of the prosecution, maintenance, and punishment, conveyance and transport, of all offenders committed for trial to the assizes in such county, from any borough in which a separate court of quarter sessions is holden, to the council of the borough. A contract had been made under the 5 Geo. 4, c. 85, between the justices of the peace of the city of H. and those of the county of H., for the support and maintenance of prisoners committed to the county gaol from the city. In practice, prisoners originally committed to the city prison, when tried at the assizes, were committed on conviction to the county prison, and supported there under this contract.

COUNTY Palatine. *See* Palatine Courts.

COUNTY Rate.

(A) *How, when, by whom, and upon whom, the call is made.*[1]

(B) *Of the Appeal against the Rate.*[2]

Subsequently to the expiration of the contract the same practice continued.

The court held, first, that the council of the city was liable to the county in respect of prisoners so committed to the city prison for trial, and afterwards committed in execution of their sentences to the county prison, after the expiration of the contract under the 5 & 6 Wm. 4, c. 76, s. 114. And, secondly, that the amount to be paid by the council for their support and maintenance was properly measured by the proportion of each of such prisoners to the general expenses of the county gaol, and not by the estimate of their food, clothing, punishment, and such other expenses as were a charge upon the gaol, directly and solely occasioned by their imprisonment therein. *Regina v. Johnson*, 2 Per. & D. 610.

[1] By the 15 & 16 Vic. c. 81, s. 20, "it shall be lawful for the justices of the peace of the several counties or divisions in England and Wales assembled, at their general or quarter sessions, or at any adjournment or adjournments thereof, and they are hereby authorised and empowered, whenever circumstances shall appear to require it, to order and direct a fair and equal county rate to be made for all the purposes to which the county stock or rate is now or shall hereafter be made liable by law, according to the basis or standard for the time being in force in such county or division of a county, and for that purpose to assess and tax every parish, township, and other place, whether parochial or extra-parochial, within the respective limits of their commissions, or within such divisions, rateably and equally, according to a certain proportion of the pound sterling, according to the fair annual value of the rateable property therein; or on account of some other parish or parishes, township or townships, place or places, being rated at a lower value of the rateable property therein than has been fixed and declared by the justices of the peace of the said county in sessions assembled, as the basis of the rate of the said county, or on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such churchwardens or overseers of the poor, or other inhabitant or inhabitants where there is no churchwarden or overseer, or person appointed to act as such, to appeal to the justices of the peace for the county, at the next quarter sessions of the peace after such cause of appeal shall have arisen, against such part of the rate only as may affect the parish or parishes, township or townships, place or places, which are unequally rated, or which shall appear to be overrated or underrated, or omitted altogether from the rate."

15 & 16 Vic. c. 81, s. 21. "Fourteen days' notice of appeal must be given to the parties against whose rate it is intended to appeal, also to the clerk of the peace of the county and the hundred constable." *See* also ss. 22, 23, and 24.

As to the collection and enforcing of the rate, *see* 15 & 16 Vic. c. 81, s. 26, *et seq.*

Boroughs not having separate quarter sessions are liable to be assessed to the county rate by the county justices. *R. v. Justices of Wilts*, 11 Q. B. 758.

The basis of the rate is ascertained by a committee of justices, and is founded "rateably and equally, according to the full and fair (net) annual value of the property rateable to the relief of the poor in every parish," &c. *See* 15 & 16 Vic. c. 81, ss. 2 to 19.

Unoccupied houses capable of being rated must be included in the valuation. *Reg. v. Overseers of Hammersmith*, 7 W. R. 524; 33 L. T. 182.

[2] If the churchwardens or overseers of the poor (or other inhabitant or inhabitants of any parish, township, or place, whether parochial or otherwise, where there is no churchwarden or overseer, or person appointed to act as such) shall at any time thereafter have reason to think that such parish, township, or place, is aggrieved by any rate or assessment now existing, or hereafter to be made upon the basis or standard mentioned in the 15 & 16 Vic. c. 81, or of any act or acts now in force, whether it be on account of the proportions assessed upon the respective parishes being unequal, or on account of some one or more of them being, without sufficient cause, omitted altogether from the rate; or on account of such parish, township, or place, being rated at a higher pound rate (to be from time to time fixed and publicly declared by such justices) upon the basis or standard hereinbefore mentioned, of the fair and full annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein; or which in any place not maintaining its poor would be liable to be rated for the relief of the poor if the said last-mentioned place were a parish, any law or statute to the contrary thereof notwithstanding; and the justices of the peace shall, in all cases where the same may be necessary, appoint proper persons within such extra-parochial or other places for the assessing, taxing, and rating such extra-parochial property, messuages, lands, tenements, and hereditaments, and levying, collecting, and paying over such assessment, taxes, and rates.

COUNTY Treasurer.[1]

COURSING Deer. *See* 24 & 25 Vic. c. 96, s. 12; and *post*, Deer.

COURT, Admiralty. *See* vol. i. p. 183.

COURT Baron. A court incident to manors held by the steward. *See* Copyhold, *ante*, p. 223.[2]

COURT, Central Criminal. *Ante*, p. 53.

COURT, Consistory. *Ante*, p. 178.

COURT, Ecclesiastical. *See* Bishop, vol. ii. p. 502; Consistory Court, *ante*, p. 178; *post*, Ecclesiastical Court.

COURT Fees.[3] *See* vol. i. p. 574. For fees in Judges' Chambers, *see* Judges' Chambers; and Masters' Offices for fees therein.

COURT, Hundred. The Hundred Court is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are there also the judges, as in the case of a court baron. See *Bradley v. Carr*, 3 Man. & G. 221. It is a court of record. In practice, no resort is ever made to this court.

COURT Leet.[4] The Court Leet or View of Frank-pledge, is a court of record held once in the year, and not oftener (Mirr. c. 1, s. 10), within a particular hundred, lordship, or manor, before the steward of the leet, being the king's court granted by Charles to the lords of those hundreds or manors.

COURT of Probate and Divorce. Established by 20 & 21 Vic. c. 85. *See* Administration, vol. i. p. 165; *post*, Judicial Separation; and Probate.

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[1] He is chosen by the justices (12 Geo. 2, c. 29, s. 6), and is to give a bond for fulfilment of duties; but the giving such security is not a condition precedent to the completion of the appointment. (4 B. & Adol. 9.) As to breach of bonds, see *Farr v. Ellis*, 9 B. & C. 315. Not bound to obey a defaced order of justices. 2 Mood. C. C. 177.

[2] The court baron is of two natures: the one, a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenure only. The other is a court of common law, and it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. Before the abolition of real actions, the court baron had jurisdiction to determine by writ of right all controversies relating to the right of lands within the manor. It may hold plea of any personal action of debt, trespass on the case, or the like, where the debt or damages do not amount to 40s. (Finch, 248.) But the proceedings may be removed into the superior courts by writ of *pone* or *accedas ad curiam*, according to the nature of the suit. And after judgment given, a writ of false judgment lies to the courts at Westminster to rehear and review the cause; which circumstances being productive of great vexation and delay, this court has fallen into almost entire disuse. 3 Steph. *Com.* 376. By the 9 & 10 Vic. c. 95, s. 14, provision is made enabling the lord of any hundred or of any honour, manor, or liberty, having any court in right thereof, in which any debts or demands may be recovered, to surrender to her Majesty the right of holding such court; after which such court shall be discontinued.

[3] The attorney, and not the client, is personally liable for the fees of the officers of the court, for these are ready-money transactions, for which the persons engaged in the business of the court is liable; for it cannot be presumed that the client would authorise him to pledge his credit where no credit is given. It is known the marshal does not receive his fees from the party, but from the attorney, who is daily practising there, and who is bound to pay, and not his client. *Robins v. Bridge*, 3 Mee. & W. 114. *Ex-parte Griffiths*, 2 Rose, 342. See *Becke v. Cattell*, 3 Man. & G. 480.

[4] A custom in a court leet for a jury to examine weights, &c. and destroy the light ones, is good. *Wilcock v. Windsor*, 3 B. & Adol. 43. It has been held, that by custom the court might be adjourned after the jury were sworn, from April to December. (Id.)

COURT of Record: Stealing Records or other legal Documents of. *See* 24 & 25 Vic. c. 96, s. 30; *post*, Larceny.

COURT of Stannaries. *See* Stannaries Court.

COURT Rolls: Forging. 24 & 25 Vic. c. 98, s. 3; and *post*, Forgery.

COURTS.[1]

COURTS, Inferior.[2]

COURTS, Superior.[3]

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[1] The various superior tribunals for the administration of justice owe their origin to the king's council. It consisted of the continual or ordinary council always in attendance on the king, comprising the high dignitaries of the realm, and of the great or extraordinary council. This assembly exercised functions deliberate, executive, and judicial.

The distinction between the "great" council and the "continual" council became clearly defined; the former entered upon a course of its own, and by the addition of representatives of the Commons became our modern parliament, and hence at this day the House of Lords is the supreme court of appeal in the kingdom.

Each branch of the business of the council had, of course, been transacted by those of its members who were best fitted to manage it. And as law became more complicated, and, in consequence of the better justice administered by the king's judges, appeals from the county courts became more frequent, it was more necessary that the counsellors who attended to legal disputes should be a class apart. Certain dignitaries, therefore, devoted themselves to the administration of the king's justice, the others to deliberation on the king's policy.

The Court of "Common Pleas," that is, of pleas between subject and subject, is referred to in very early times, and was finally detached from the council by Magna Charta, which provides that it shall not follow the king's court, but shall be stationary. It took root at Westminster, and is there now. The "Exchequer," so called because the judges used to sit at a table covered with chequers as an aid to their calculations, and cognisance of the king's claims for revenue; and by a fiction of later times entertained civil suits in general. The "King's Bench," for the trial of pleas of the crown, including public crimes where the Crown prosecutes, is even now supposed to be holden *coram ipso rege*, and to follow the king's court, its writs being returnable *ubicumque fuerimus in Anglia*. Other courts also separated themselves from the great court of the king about the time of Edward I., such as the Court of Chivalry under the Earl Marshal, the Court of the High-Steward, and the Court of the Marshalsea, for plaints between members of the king's household, which, after being remodelled into the Palace Court of Westminster, has at last been abolished. Yet another great institution was to emerge from the perpetual council—the Chancery. The council, after the severance of the common-law courts, still remained the fountain of justice, and under the presidency of the Chancellor still entertains suits which could obtain no redress in the ordinary courts. Gradually and naturally such cases were referred to the Chancellor sitting alone, and he acquired still more the character of the supreme judge, as being the source of all the writs by which common-law actions commenced, and as being the keeper of the conscience of the king.

Statutory, or contrasted with customary tribunals, are the existing Court of Bankruptcy (*ante*, vol. ii. p. 145), the Central Criminal Court (*see ante*, p. 53), the Vice-Chancellors' Courts, the Lords Justices, the new Court of Exchequer Chamber, the Court of Criminal Appeal, the Court of Probate and Divorce, the institution of the Judicial Committee of the Privy Council, which has superseded the Delegates, or the highest court of appeal in admiralty and ecclesiastical matters.

The legislature has obliterated many of the distinctions between law and equity, by giving to the common-law courts powers of discovery hitherto the peculiar advantage of equity, and by extending to equity the oral examination of witnesses hitherto confined to the common law.

[2] The Uniformity Process Act does not extend to inferior courts, and, therefore, the declaration may be according to the old forms. *Dod v. Grant*, 6 Nev. & M. 70. And it must show that the cause of action arose within the jurisdiction of the court. *Briscoe v. Stephens*, 2 Bing. 213.

Proceedings in an inferior court are contrary to law if no previous summons issue to found them. *Bruce v. Wait*, 1 Scott, N. S. 181; 1 Man. & G. 1. And a custom in an inferior court to summon and declare at the same time, and proceed to judgment without an appearance, is bad. *Williams v. Bagot*, 3 B. & C. 772.

The defendant cannot plead a former suit pending in the mayor's court in Liverpool to an action in the superior courts. *Laughton v. Taylor*, 6 Mee. & W. 695; 8 Dowl. 776.

[3] The superior courts of common law are the Queen's Bench, Common Pleas, and Exchequer, which rank in the order in which

COURTS in General.[1]
COURTS-MARTIAL.[2]

they are named. These are the only superior courts of original jurisdiction; but an appeal lies from them to the Exchequer Chamber in the first instance, and thence to the House of Lords. The three superior courts of common law exercise a common or concurrent jurisdiction in the great majority of cases, and the practice in respect of these is now identical. Each court has, however, a peculiar and exclusive jurisdiction in certain matters. Their local jurisdiction extends throughout England and the principality of Wales (11 Geo. 4, and 1 Wm. 4, c. 70, ss. 13, 14, and 6 & 7 id. c. 19), and the town of Berwick-upon-Tweed. It does not, however, include Scotland or Ireland, the Isle of Man, the Channel Islands, Jersey, Guernsey, Alderney and Sark, nor the islands adjacent thereto. *See* Common Pleas, *ante*, p. 153; *post*, Exchequer; Queen's Bench.

[1] If a statute creating a court give a seal, other courts will take judicial notice of the seal. *Doe v. Edwards*, 1 Per. & D. 408.

A court given by a corporate charter is not abandoned by disuse. *Rex v. Mayor of Wells*, 4 Dowl. 563.

[2] Courts-martial are courts convened by the Crown pursuant to the Mutiny Act, having authority to try and punish offences according to the Articles of War and the provisions of this act. In order, however, to limit as far as possible the power conceded to the Crown in this matter, it is enacted that nothing therein contained shall be construed to exempt any officer or soldier from being proceeded against by the ordinary course of law; and that where he is accused of any offence punishable against a subject of the realm by the known laws of the land, he shall be delivered over to the civil magistrate. 2 Step. Com. 597.

Courts-martial being tribunals specially instituted by the legislature for the trial of military offences, it is an established rule of law that their sentences cannot be interfered with on the ground of punishment being excessive or disproportionate to the offence. Prendergast's *Law of Army*, 200.

The superior courts have no jurisdiction to interfere or remove the proceedings so long as the court-martial confines itself within its jurisdiction. It seems that even where it has exceeded its jurisdiction, or acted without jurisdiction, these tribunals will not interfere if the court-martial affects by its sentence the military status alone of the accused; but where the civil rights of a person in military service are affected by the judgment of a military tribunal, in which that tribunal has acted without jurisdiction, or has exceeded the jurisdiction, then, it has been said, they will interfere. *In re Mansergh*, 1 Best & Smith, 400; 30 L. J. Q. B. 296. "I quite agree," said *Cockburn, C. J.*, "that where the *civil* rights of a person are affected by the judgment of a military tribunal, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this court ought to interfere to protect those civil rights; *e. g.* where the rights of life, liberty, or property are involved; although I do not know whether the latter case could occur. Here, however, there was nothing of the sort, and the only matter involved was the *military* status of the applicant—a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the sovereign." *Re Mansergh, supra.* "The principle," said *Sir E. Perry* (*Porrett's case*, Perry's *Oriental Cases*, 414), "of the non-interference of the superior courts of law with the procedure of courts-martial is clear and obvious. The ground-work of the jurisdiction, and the extent of the powers of courts-martial, are to be found in the Mutiny Act and the Articles of War; and upon all questions arising upon these her Majesty's judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the miliary code, for they are for the most part silent upon all that relates to the procedure of the military tribunals to be erected under them. Now, this procedure is founded upon the usages and customs of war, upon the regulations issued by the sovereign, and upon old practice in the army, as to all which points common-law judges have no opportunity, either from their law-books or from the course of their experience, to inform themselves. It would, therefore, be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the procedure of courts-martial those rules which are applicable to another and a different course of practice." *See* Ship Bounty, 1 East, 318, id. n.

In *Serjeant Grant's case* (2 H. Black. 107) there was an undoubted informality in the finding of a court-martial, but the court refused to interfere, *Lord Loughborough* saying that "it would be exceedingly absurd to comment upon it as if it were a conviction before magistrates, which was to be discussed in a court where that conviction could be reviewed." So in *Rex v. Suddis* (1 East, 313), where an imperfect finding of a court-martial came before the Court of King's Bench, *Lord Kenyon, C. J.*, said, "We are not now sitting as a court of error to review those proceedings, nor are we to hunt after possible objections;" and *Mr. Justice Grose* added, "It is enough that we find such a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with power to inflict such a sentence; as to the rest, we must presume *omnia rite acta*." See *Re Poe*, 5 B. & Adol. 681; 2 N. & M. 636.

COURTS of Equity.[1] *See* Equity.

COVENANT. *See* Arbitration, vol. i. p. 427; *post*, Deed; Husband and Wife; Infant; Lease; Partners; Principal and Agent.

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1*st*. *Contrary to General Policy*, p. 461.

(*a*) *Husband and Wife*, p. 461.

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It is by s. 38 of the 21 & 22 Vic. c. 13 (The Mutiny Act, 1857), enacted, "that the place of imprisonment of persons under sentence of general courts-martial shall be appointed by the officer commanding the district." It was held, that a person imprisoned under such a sentence, in a place other than that so appointed, was entitled to be discharged by writ of *habeas corpus*. *Ex parte Allen*, 30 L. J. Q. B. 38; 7 Jur. (N. S.) 234. See *R. v. Juddis*, 1 East, 306.

Charging for stores not issued is an offence punishable by a court-martial. *Mann v. Owen*, 9 B. & C. 595.

[1] Courts of equity have a concurrent jurisdiction with the county palatine of Lancaster. *Cheetham v. Crook*, 1 M'Clel. & Y. 307.

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I. Of Covenants, their Nature and Qualities.[1]

1st. With Reference to their Creation.

(A) *By what Instruments.*[2]

2d. Covenants distinguished from,

(A) *Conditions.*[3]

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[1] A covenant is defined to be an agreement in an instrument in writing sealed and delivered, by which one person obliges himself to do something beneficial, or abstain from something which, if done, might be prejudicial to another. A great variety of agreements of this kind have been introduced into modern deeds. A covenant is generally to do something *in futuro;* and where an agreement terminates in itself it is not properly a covenant, but a defeasance, as a covenant by a lessee that the demise shall be void. *See post*, Covenant distinguished from Defeasance, 2d. (C.) A covenant may, however, be executed, namely, that a thing is already done. *See* Plowd. 138; Shep. Touch. 162; 4 Cru. Dig. 329; 2 Bl. Com. 304; 1 Vent. 26.

The party entering into the covenant is called the covenantor, and he with whom it is made the covenantee.

[2] A covenant may be created by indenture or deed-poll. *Green v. Horne*, 1 Salk. 197.

A mere recital of an agreement in a covenant, without a covenant to perform, is binding as a covenant. *Sampson v. Easterby*, 9 B. & C. 505; affirmed on error, 6 Bing. 645.

A deed-poll in the form of a power of attorney is held in equity to amount to an assignment, or to a covenant to assign. *Bennett v. Cooper*, 9 Beav. 252; 10 Jur. 507; 15 L. J. Ch. 315. Case will lie by an assignor against the assignee upon the implied duty to perform the covenants in a lease. *Burnett v. Lynch*, 5 B. & C. 589.

[3] A clause in a lease that the lessee paying the rent, &c. shall quietly enjoy, is a covenant, and not a condition. *Hays v. Bickerstaffe*, 2 Mod. 34; S. C. Vaugh. 118; S. C. 1 Freem. 194. S. P. *Allen v. Babbington*, 1 Sid. 280. *Wakeman v. Waker*, Freem. 414; S. C. 1 Vent. 294; S. C. 2 Lev. 150.

2d. Covenants distinguished from,

(B) *Conveyance.*[1]

(C) *Defeasance and Release.*[2]

TREVETT v. AGGAS, 2 Com. 568; Willes, 107.

A defeasance may be by a subsequent covenant.[3]

To an action of debt on a bond, the defendant pleaded a subsequent covenant by the plaintiff, that if the defendant paid 5*s.* in the pound on the 25th December next, for every 20*s.* due to the plaintiff from the defendant, and so at the same rate for every greater or less sum than 20*s.*, on or before the 25th December next, then the plaintiff would accept the same composition, in full dis-

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And on a covenant to repair, 5000 slates being found by the plaintiff for that purpose, the court inclined to think that the word "being" made a covenant, and not a condition precedent. *Mucklestone v. Thomas*, Willes, 146. See *per Holroyd*, 2 B. & A. 111, 112.

So the words, "it is provided and agreed," amount to a covenant, and not a condition (*Samways v. Eldsly*, 2 Mod. 74); but the words *ita quòd* make a condition precedent, and not a covenant (*Feltham v. Cudworth*, 7 Mod. 11); and where there was a covenant in a deed-poll by A., to assign South-sea stock as soon as the scrip should be delivered out, and by B. to accept the same, and to pay 950*l.* on a day certain, in consideration thereof; the delivering of the scrip was considered a condition precedent, and not a covenant. *Lock v. Wright*, 8 Mod. 40; S. C. 1 Stra. 569.

And where A. covenanted to deliver up his business to B., who covenanted at and before the delivery of the deeds to provide sufficient security for the payment to A. of 250*l.* a month, the giving this security was held to be a condition precedent. *Kingston v. Preston*, cited in *Jones v. Barkley*, 2 Dougl. 689; S. C. *Anon.* Lofft, 194.

If A. covenants to convey at the charge of the covenantee, the latter must tender the charge; but it is otherwise if A. covenants to convey, and B. covenants to be at the charge. *Steer v. Shalecroft*, 12 Mod. 400; S. C. Holt, 177.

A covenant, that "the lessee paying rent shall quietly enjoy," is not a conditional covenant. *Dawson v. Dyer*, 2 Nev. & M. 559; 5 B. & Adol. 584.

[1] Covenant by itself does not raise an use, nor pass an estate. *Wigson v. Garret*, 2 Lev. 149; S. C. Raym. 239; S. C. Keb. 366, 489, 510, 536, 572; S. C. Freem. 407, 411. Thus, a covenant in articles of agreement to demise paying rent does not amount to a demise. *Copley v. Hepworth*, 12 Mod. 1; 3 Salk. 108.

When the agreement refers to a future act of demise, it shall not have the operation of the demise itself; but where it is intended by the parties to be the instrument under which the lands are held, it shall have that operation. *See* 6 East, 531; 15 id. 244; 3 Taunt. 65.

And where A. granted and covenanted to convey an office after the death or forfeiture of the then holder, no estate passed, but the words were merely those of covenant. *Saviere v. Lenthal and others*, Comb. 173, 207; S. C. 3 Mod. 273. So an allowance of bote enures by way of covenant only (*Saunders v. Taylor*, Freem. 233); but the words "grant and agree" that A. shall have a right of way amount to a grant, and not only to a covenant. *Holms v. Seller*, 3 Lev. 305. Yet a covenant by a landlord that his tenant should have the use of a pump, "whilst the same should remain in the yard," the tenant paying half the expenses of repairs, was held not to amount to a demise of the pump, and therefore not broken by the landlord's removing it, however unreasonable his motive for so doing, though it would have been otherwise if those words had not been inserted. *Rhodes v. Bullard*, 7 East, 116; S. C. 3 Smith, 173. Nor will a covenant or agreement between co-heirs to present to an advowson by turns, of itself work a partition of an advowson (*Crossman v. Sir John Churchill*, 2 Mod. 97); but a joint inheritance in an advowson in gross is severed by a covenant between the joint-tenants that they shall be seised in common, and present by turns. *The Bishop of Salisbury and others v. Phillips*, Carth. 505; S. C. 1 Salk. 43; S. C. 1 Ld. Raym. 535; S. C. 12 Mod. 321. So the words "covenant, grant, and agree," will operate as a present lease of copyholds, and consequently create a forfeiture. *Sed quære? Richards v. Sely*, 2 Mod. 80; S. C. 3 Keb. 638.

[2] Covenant not to sue on a bond "till such a day" is a defeasance; "not to sue at all," a release (*Lacy v. Kynaston*, 12 Mod. 415, 548; Holt, 178, 218; 1 Ld. Raym. 688; 2 Salk. 575); but in this case it is said that a covenant not to sue within seven years cannot be pleaded in bar to an action of debt on bond, not operating as a defeasance (*Ayliff v. Scrimsheire*, 1 Show. 46; S. C. 2 Salk. 573; Carth. 63; Holt, 619. S. P. *Carvell v. Edwards*, 1 Show. 330; Carth. 210; Holt, 547. However, an agreement by covenantee to indemnify covenantor operates as a defeasance (*Lacy v. Kynaston, supra.* And a proviso that no action shall be brought for a month does not operate merely as a covenant not to sue, but that the effect is to extend the period for payment for one month, and therefore that no action is maintainable until the month has expired. *Foley v. Fletcher*, 28 L. J. Ex. 100. *See* Covenant not to sue, *post*; and *Ford v. Beech*, 17 L. J. Q. B. 114; and 18 L. J. id. 142; 19 id. 34.

[3] But if a thing, executory at its commencement, be after executed, it cannot be

charge of all such sums of money as then were, or, on the said 25th of December, should be due from the defendant to the plaintiff; and that on payment of the said sum of 5*s.* in the pound, or 5*s.* for every 20*s.* to the plaintiff, the said deed should be a release to the defendant, to be pleaded or given in evidence. For the plaintiff, it was insisted that this was no defeasance but a covenant.

Per Cur. This is a defeasance to this bond, and sufficiently relates to it, for it is not necessary to recite the bond any more than where a power of revocation is inserted in a deed; a revocation by a subsequent deed is good, though it does not recite or mention the power, or in direct words refer to it. 10 Co. 143-4. *Scroop's case.*

DEAN v. NEWHALL, 8 Term Rep. 168. S. P. CLAYTON v. KYNASTON, 12 Mod. 221; S. C. 1 Ld. Raym. 419; S. C. 2 Salk. 573. S. P. LACY v. KYNASTON, 12 Mod. 415, 548; S. C. Holt, 178, 218; S. C. 1 Ld. Raym. 608; S. C. 2 Salk. 575; S. C. 3 Salk. 298. S. P. FITZGERALD v. TRANT, 11 Mod. 254; S. C. 1 Com. 139.

A covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, and be a release, will not operate as a release so as to discharge the other, but simply as a covenant.[2]

The defendant became surety for one T. to the plaintiff, in a bond for 200*l.*; T. becoming insolvent, assigned over all his effects to F. and B. in trust for themselves, and all the other creditors who should execute the deed. The plaintiff, one of the creditors, executed the deed and received a dividend under it of 48*l.* In the deed was contained a covenant by the creditors, that "they would not sue, arrest, implead, or prosecute T., his executors or administrators, or his or their goods, &c. for, or on account of any debt, &c.; and in case any of the said creditors should sue, &c., those presents should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the said T., his executors &c.; and he and they should be, and were thereby acquitted, released, and discharged against them the said creditors, &c., and as such, should and might be pleaded in bar by him the said T.," &c. The foundation of the defendant's argument was, that the deed of assignment was a release to T., and therefore it was a release also to the defendant. For the plaintiff it was urged, that this was not a release to T., it only operated *quà* a release. If T. himself had been sued, he could not have pleaded that the plaintiff had released him, though he might have pleaded this deed in bar, which, as between those parties, would have operated *quà* a release; but even that was only permitted in order to avoid a circuity of action: but where the obligee entered into a covenant not to sue one of two joint and several obligors, the covenant could not be pleaded in bar to an action on the bond, and *Fitzgerald v. Trant*, 11 Mod. 254, and *Lacy v. Kynaston*, Holt's Rep. 178; 1 Ld. Raym. 690; and 12 Mod. 551, were cited.[1]

Per Cur. The last case removes all difficulty on this subject, and is a direct authority in favour of the plaintiff; and that the honesty and justice of the case are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief. *See* Co. Litt. 232, a; Litt. Rep. 191; Hob. 70; Salk. 574; 1 Show. 46, 330; Carth. 210; Holt, 546; 1 T. R. 446.

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defeated by a subsequent defeasance. 5 Co. 90, b.

[1] A modern case, *Doe d. Willson and others v. Phillips*, 2 Bing. 13, has decided that in an agreement to let, in which there was no clause of re-entry, the following stipulation was a covenant, and not a condition, operating in defeasance of estate:—"It is also hereby agreed and clearly understood, that in case the said A. W., or his heirs, executors and assigns, should want any part of the said land to build, or otherwise, or cause to be built, then the said T. R., or his heirs, executors or assigns, shall and will give up that part or parts of the said land as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence at a fair valuation as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends to do."

[2] Nor, even if they are joint-debtors, the rules applying only to cases in which the covenantor and covenantee stand alone (*Hut-*

(D) *Exception.*[1]

(E) *Recital.*[2]

3d. The different kinds of Covenants.

(A) *Express.*

(*a*) *By what Words created.*

HARWOOD v. HILLIARD, 2 Mod. 268 ; 3 Keb. 848.

The formal words of "covenant, grant," &c. are not requisite to make a covenant.[3]

Per Cur. A. being party to a deed, his agreement to pay amounts to a covenant, although the formal words of "covenant, grant," &c. are wanting. *See* 4 Cru. Dig. 393; Com. Dig. Covenant, A. 2; Vin. Abr. Covenant, C.; Cro. Jac. 399, 521; 2 Mod. 92; 12 East, 182, n.; 1 Ch. Ca. 294; 1 Ves. 511.

CLAPHAM v. MOYLE, 1 Lev. 155. SAMWAYS v. ELDSLY, 2 Mod. 74.

Thus, covenant arises on the word "provided."[4]

The plaintiff conveyed an office to the defendant, *provided* that, out of the first profits he should pay to the plaintiff 500*l.* And it was adjudged that an action of covenant would lie on this proviso, for it was not by way of a condition or defeasance, but in the nature of a covenant to pay the money.

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ton v. Eyre, 6 Taunt, 289 ; 1 Marsh, 603); but a defeasance or release as to one, is a defeasance to all (*Clayton v. Kynaston*, 12 Mod. 221 ; 1 Ld. Raym. 419; 2 Salk. 573. *Lacy v. Kynaston*, 12 Mod. 415; 2 Salk. 575; 3 Salk. 298; Holt, 178, 218; 1 Ld. Raym. 688) : so a covenant in a composition deed not to sue, if the trustees account, is not a release, if they refuse to account (*Kesterton v. Sabery*, 2 Chit. Rep. 541) ; and where the instrument amounts to a covenant only, it cannot be pleaded in bar. *Baber v. Palmer*, 12 Mod. 539; *see* 17 L. J. Q. B. 114; 18 id. 142 ; 19 id. 34.

[1] An exception in a demise that the lessor should have yearly 200 fagots, does not amount to a covenant on the part of the lessee to deliver them. *Tuckerman v. Tuckerman*, Lutw. 118; Nels. Lutw. 101.

[2] An insensible word shall be struck out, *ut res valeat*, as the word "whereas," when the deed cannot be intended as a recital merely. *Hilton v. Smith*, 1 Nels. Lutw. 8vo. edit. 180, fol. 150.

An indenture, between the plaintiffs and the defendant and five other parties recited a marriage settlement, under which the plaintiffs and others were trustees, a mortgage of certain property to the trustees by the defendant for 525*l.*; that the mortgage debt and an arrear of interest amounting to 52*l.* 10*s.* were due; a subsequent agreement, whereby the defendant contracted to purchase the premises for 577*l.* 10*s.*; that one of the trustees was desirous of retiring, the appointment of a new trustee, and that the contract of sale had not been carried into effect; and then a recital, that the said principal sum of 525*l.*, and the said arrear of interest of 52*l.* 10*s.*, making together the sum of 577*l.* 10*s.*, is still due and owing from (the defendant) to (the plaintiff), as he (the defendant) doth hereby acknowledge: —*Held*, that this latter recital did not amount to a covenant by the defendant to pay the sum mentioned, the whole scope of the deed showing the acknowledgment therein to have been made *diverso intuitu*. *Courtney v. Taylor*, 7 Scott, N. R. 749.

The recital in a deed of an agreement between the parties to the deed amounts to a covenant, if there be nothing in the rest of the deed to show an intention in the parties not to be bound by the terms of such agreement. *Farrall v. Hilditch*, 5 C. B. (N. S.) 840; 5 Jur. N. S. 962; 28 L. J. C. P. 221; 7 W. R. 409; *see* 4 M. & S. 265.

[3] In *Saltoun v. Houstoun*, 8 Moore, 546, 1 Bing. 433, the court said: "In order to constitute a covenant, it is not necessary that the word 'covenant' should be expressly employed; and if it were necessary to refer to a case in support of so clear a proposition, we might mention *Stevinson's case*, 1 Leon. 324."

Where, in a deed between A. and B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay appear upon the face of the deed. *Courtenay v. Taylor*, 6 Man. & G. 851; 7 Scott, N. R. 749.

No precise form of words is necessary: it is enough if the intention of the parties mutually to contract is apparent from the general scope of an instrument under seal, more especially where it commences with the words, "It is hereby agreed by and between the said parties in manner following." *Wood v. Copper-Miners' Co.* 7 C. B. 906; 18 L. J. C. P. 292.

[4] And in the case of personalty, on the word *dedi* (*Browne v. Honywood*, 1 Freem. 339, 414; S. C. 3 Keb. 188, 549, 617); so the words, "I bind myself to pay so much

(B) *Implied*.

(*a*) *How and by what Words raised*.[1]

on such a day" (*Norrice's case*, Hard. 178), and a bond for payment of money when an account is settled by two attorneys, one to be chosen by the obligor, and the other by the obligee, amounts to a covenant (*Otway v. Holdips*, 2 Mod. 266). In truth, on any words in a deed purporting to be an agreement for payment of money, covenant will lie. *Brice v. Carre*, 1 Lev. 47; S. C. 1 Keb. 155.

The words "yielding and paying," also amount to an express covenant (*Hellier v. Casbard*, 1 Sid. 266. *Newton v. Osborn*, Sty. 387. *Porter v. Swetnam*, Id. 406, 431. *Hollis v. Carr*, 2 Mod. 87; S. C. Finch, C. R. 261; S. C. 2 Freem. 3); and an agreement that it should be lawful for one to hold another's property for a certain time amounts to a contract that he should not hold it for a longer period. *Randall v. Lynch*, 12 East, 179; 2 Camp. 352.

On words of exception also covenant may be maintained: thus, a lessee covenanted to plough the demised premises (*except* the rabbit warren); he was held liable for ploughing (*The Duke of St. Albans v. Ellis*, 16 East, 352). And on a reservation, or an exception of a thing *dehors*, and not part of the thing demised, covenant will lie. *Bush v. Cole*, 12 Mod. 24; Carth. 232; 1 Salk. 196; 1 Show. 388.

Words in the præter tense may amount to a covenant *in præsenti* (*Hilton v. Smith*, 1 Nels. Lutw. 8vo. edit. 180, fol. 150): but the words "grant and enfeoff" on a freehold do not constitute a covenant (*Browne v. Honywood*, Freem. 339, 414; 3 Keb. 188, 549, 617). Nor will covenant lie against the directors who executed a policy of insurance against fire, which ran thus, "Now we whose names, &c. do order and direct the directors for the time being to pay out of the funds," &c., these words importing merely an order to pay, and not a covenant; the remedy, therefore, was in equity. *Alchorne v. Saville*, 6 J. B. Moore, 202, n. a.

By an express covenant a man may bind himself to do an act which the law would not compel him to perform (*Barker v. Thorold*, 1 Saund. 47; 2 Keb. 145); and it has been decided that, if a man covenants to be examined as to matters which will be penal upon him, equity will not interfere to prevent it (*East India Co. v. Atkins*, 1 Stra. 168; S. C. Com. Rep. 347). Thus A. having an estate without impeachment of waste, may bind himself by covenant to keep in repair (*Chesterfield v. Bolton*, 2 Com. 626); and for the same reason, a stranger will be bound by his covenant that B. shall do an act, although the third person be not personally responsible. *Lupart v. Welson*, 11 Mod. 170.

A party cannot recover in ejectment against his own covenant. *Right d. Green v. Proctor*, 4 Burr. 2208–9.

An agreement for a demise does not necessarily import that the lease should be made by the party agreeing. *Clarke v. Peppin*, 2 Vent. 99.

The plaintiff, by indenture, referring to a parol agreement, covenanted with the defendant to manufacture cement for him of a particular quality, and also to instruct him in the art and mystery of manufacturing cement; and, in consideration thereof, the defendant covenanted to pay the plaintiff the weekly sum of 4*l*. for the two years following the date of the agreement, and the weekly sum of 5*l*. during the year next following; and to receive him into partnership at the expiration of three years from the time of making the said agreement:—*Held*, that there was no implied covenant by the defendant to retain the plaintiff in his service during the three years, or any part of that time; and therefore, though the plaintiff might have sued for the non-payment of the weekly sums, he could maintain no action for being dismissed from the defendant's service. *Aspdin v. Austin*, 13 L. J. (N. S.) Q. B. 155.

[1] The word *reddendum* raises a covenant in law which will run with the reversion (*Harper v. Burgh*, 2 Lev. 206; T. Jon. 102. *Nurstie v. Hall*, 1 Vent. 10. *Giles v. Hooper*, Carth. 135); and an implied covenant arises on the words *assignavit et transposuit* (*Deering v. Farrington*, 1 Mod. 113; 3 Keb. 304; Freem. 367); and on the word *dimisi* (*Hacket v. Glover*, 10 Mod. 142), or *dimiserunt* (*Coleman v. Sherwin*, 1 Salk. 137; Show. 79), or *demise*. (*Deering v. Farrington, supra*). But on a lease of a house, with the use of a pump, it was held that this was no implied covenant, and that the lessee could not bring covenant against the lessor for non-repair, without an express covenant to that effect. Where one, however, assigned his whole interest in a certain medicine, of which he was the original proprietor, the law implied a covenant that he should not himself continue to vend the same medicine for his own profit, and an action of covenant was supported on this implication. *Seddon v. Senate*, 13 East, 63.

No covenant can be implied from a party having merely the equity of redemption so as to render him liable. *Smith v. Pocklington*, 1 C. & J. 445.

Where directors covenant to pay by instalments, and on the last six months' time is to be given, if the shareholders have not paid their shares the directors are personally liable at the expiration of that time. *Hancock v. Hodgson*, 4 Bing. 269.

A subsequent chairman of a company is not liable on a deed entered into by a former, though for the purposes of the company. *Hall v. Bainbridge*, 8 Dowl. P. C. 583; 1 Man. & G. 42; 1 Scott, N. C. 151.

And where the proprietors raise money under a local navigation act, as such it is not a personal covenant, and they are not personally liable. *Poulet v. Basingstoke Canal Co.* 3 Bing. N. S. 435; 4 Scott, 157.

(C) *Real.*[1]

A written authority not under seal does not authorise an agent to execute a deed. *Berkeley v. Hardy*, 5 B. & C. 355; 8 D. & R. 102.

Where, in an indenture between A. and B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay appear upon the face of the deed. *Courtney v. Taylor*, 6 Man. & G. 851.

Secus where the acknowledgment appears to have been made solely for a collateral purpose. (Id).

A deed between the plaintiffs and defendants (a railway company), after reciting that the defendants were desirous of being supplied with 350,000 railway sleepers, and that the plaintiffs were willing to supply them according to the terms of a specification and tender, contained a covenant by the plaintiffs that they would supply the sleepers within the time specified, "as and when, and in such quantities and in such manner," as the engineer of the company, by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000; that one-half would have to be delivered in 1847, and the remainder by Midsummer, 1848. The deed, also, contained provisoes that the engineer might vary the times of delivery; that the company should retain 2000*l.* in their hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered; and that the contract might be put an end to upon default made by the plaintiffs, or upon their bankruptcy or insolvency: — *Held* (by the Exchequer Chamber affirming the judgment of the court below), first, that there was an implied covenant on the part of the company to take the whole number of 350,000 sleepers. *Great Northern Railway Co. v. Harrison* (in error), 12 C. B. 576; 16 Jur. 565; 22 L. J. C. P. 49, Ex. Ch.; S. C. in court below; 16 Jur. 453; 21 L. J. C. P. 89.

By deed executed by the plaintiff and an incorporated company, after reciting that the plaintiff had agreed to construct for the company a well, and other works particularised in a previously prepared specification, the plaintiff covenanted to construct the well and other works mentioned in the specification, and to provide all engines, pumps, and all other implements and things mentioned in it, as required to be provided by the person contracting to perform the work, or as might be found necessary to carry on and complete the works, and all workmanship and labour whatsoever necessary and sufficient for making, constructing, and completing the works in a good and workmanlike manner, and in all respects conformable to the specification. The specification, which was under the company's seal, contained the clause, "the contractor will be required to sink the well to the depth of 120 feet, after which the company will undertake the erection of a permanent steam-engine, and permit the pumping to be performed by it:"— *Held*, that there was an implied covenant by the company to erect the permanent steam-engine. *Knight v. Gravesend and Milton Waterworks Co.* 27 L. J. Ex. 73.

In an action against an insurance company on a life policy for years, with participation of profits, the declaration set out the policy, by which it was provided that the capital funds of the company should alone be liable to the claim according to the deed of settlement, and so proceeded to assign for breaches that the defendants wrongfully aliened those funds to another company, and ceased to carry on the business according to the deed of settlement, and thereby disabled themselves from performing their contract. The deed of settlement contained provisions applicable in case of dissolution, and the company dissolved themselves by deed, amalgamated themselves with another company, and assigned their business and property to that company; but the terms of the deed of settlement as to dissolution were not followed: — *Held*, first, that there was no covenant in the policy that the company would carry on the business to be implied either from the funds alone being liable, or from the assured being insured with participation of profits. Secondly, that if the dissolution was *ultra vires* (as it appeared to be), there was not operative alienation of the funds, and if it was according to the deed of settlement then the plaintiff could not complain. Thirdly, that the action was brought by the plaintiff *quia timet*, and before any right of action incurred, and the plaintiff had suffered no injury. *King v. Accumulative Life Fund and General Assurance Co.* 3 C. B. (N. S.) 155; 3 Jur. N. S. 1264; 27 L. J. C. P. 57.

[1] Covenants real are those which have for their object something connected with land or other real property. Thus, where three coparceners purchased lands in fee, and covenanted that the survivors should convey to the heirs of such as should die first, this was resolved to be a covenant real. 1 Inst. 384; 6 Jenk. 241; 4 Cru. Dig. 397. They are said to run with the land as they descend to the heir, and are transferred to the purchaser by the conveyance, and bind all claiming under the grantor or lessor, both his real and personal representatives. Co. Litt. 384, b.; 1 Roll. Abr. 521; Cro. Car. 503, 505; Sir W. Jones, 406. *Spencer's case*, 5 Co. 17, a. *Palmer v. Edwards*, Dougl. 186. And a court of equity will give its assistance to an assignee against all persons claiming under the grantor of an estate to procure him the benefit of the covenants contained in the grant, which run with the

Bouls v. Horton, Freem. 57.

A warranty is a covenant real annexed to the land of an estate of freehold and inheritance; for, if it be annexed to a chattel, it is a personal covenant, whereupon damages may be recovered. *See* Co. Litt. 365, a, 101, b; Hob. 4; Freem. C. 547. Distinction between covenant real and personal.

(D) *Personal.*[1]

(E) *Mutual or Independent.*

Pordage v. Cole, 1 Saund. 319; 1 Sid. 423; 1 Lev. 274; T. Raym. 183; 2 Keb. 533, 542, 543.

An action of debt was brought on the following agreement:—

"11 May, 1668.

"It is agreed between J. P. and B. C. that the said B. C. shall give unto the said J. P. 775*l.* for all his lands, with Ashmole House thereunto belonging. In witness whereof we do put our hands and seals; mutually given as earnest in performance of this 5*s.*, the money to be paid before Midsummer, 1668." Mutual covenants were adjudged to arise on the words, "It is agreed between A. and B.," &c. that, &c.[2]

The defendant demurred, and excepted to the declaration because the plaintiff had not averred that he had conveyed, or, at least, tendered a conveyance of them,

thing granted. *Holmes v. Buckley*, 1 Abr. Eq. 27. So, on the other hand, where a covenant is entered into by the grantee or lessee, which relates to the land, it will in like manner run with the land, and charge the representatives or assignees of such grantee or lessee; and the grantor or lessor, or his heirs, may at any time bring an action on such covenant. Co. Litt. 215, a, b. It is not, however, sufficient that a covenant is concerning the land, but, in order to make it run with the land, there must be a privity of estate between the covenanting parties. *Per Lord Kenyon: Webb v. Russell*, 3 T. R. 393. *Stokes v. Russell*, id. 678; 1 H. Black. 562.

[1] A personal covenant is one which does not affect the land demised, but is merely collateral to it. *Spencer's case*, 5 Co. 16, 2d resolution. Instead, therefore, of running with the land and binding the persons entering into possession, it affects only the covenanter during his life, and the assets in the hands of his representatives after his death, by reason of the privity of contract. Com. Landlord and Tenant, 101, 102. Thus, if there be a covenant to build a wall upon land, not being parcel of the land demised, or to pay a sum of money to the lessor or a stranger, this is merely a personal covenant, and cannot affect the assignee, even though he be expressly named. (Id. 234.) And it is to be observed that executors and administrators are bound by every covenant without being named, unless it is such a covenant as is to be personally performed by the covenantor, and there has been no breach before his death. Cro. Eliz. 553; 48 E. 3, 2.

A covenant that part of lands sold (the whole being charged with a fee-farm rent), should be discharged of the rent, was decided to be a personal covenant only, and did not run with the land in the hands of an assignee (*Cook v. Earl of Arundel*, Hardr. 87); so, a covenant for payment of freight to the owner of a vessel, being a mere personal contract, was not assigned on a transfer of the ship so as to run with the property. *Splidt v. Bowles*, 10 East, 279.

And where A. conveyed an estate to B. in fee to the use that A., his heirs and assigns, might receive a yearly rent to be issuing out of the premises, which rent B. covenanted to pay, and A. granted this rent to C. for 1000 years, the covenant was held to be merely personal to A., and C. could not maintain an action on it against B. for non-payment. *Milnes v. Branch*, 5 M. & S. 411.

A warranty of goods comprises property as well as possession. *Hacket v. Glover*, 10 Mod. 142.

[2] And also on a covenant by A. to do an act, and by B. in consideration of the performance thereof, to pay a sum of money (*Humlock v. Blacklow*, 1 Mod. 64; 2 Saund. 155; 1 Sid. 464; 2 Keb. 674). And where the plaintiff and defendant covenanted between them that the plaintiff should raise 500 soldiers, and that the defendant should find shipping for them, these were held to be mutual covenants (*Ware v. Chappell*, Sty. 186); and that mutual remedies arose on a covenant that A. should have power to fell trees, repairing the hedges (*Warren v. Asters*, T. Jon. 205; 2 Mod. 317): so on a covenant by a lessee to leave compost on the soil of the landlord, the lessee *having* the yard and a room to dress diet in. *Dodd v. Innis*, Lofft, 56.

And where A. covenanted to transfer South-sea stock on or before, &c., and B. to pay a sum on or before the said day, these were *mutual* covenants; and in this case a declaration in covenant by A., stating that he was ready to transfer on the day, but that the defendant refused to accept, was held good (*Blackwell v. Nash*, 8 Mod. 106; 1 Stra. 535. *Wilkinson v. Meyer*, 8 Mod. 173. *Dawson v. Myer*, 1726; 1 Stra. 712). And where A.

for the defendant had no remedy to obtain the lands, and that the word *for* made a condition in things executory.

Per Cur. The action is well brought without an averment of the conveyance of the land, because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he also has an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land, and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as it is here. And by the conclusion of the deed it is said that both parties had sealed it. — Judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber.

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agreed to take B. as a partner, and give him half the interest in the lease of a house, to commence *from and after* 29th September, and B. agreed to pay 300*l.* as a premium to be admitted *on or before* that day, A. could sue for the 300*l.* not paid on that day, although no articles of partnership or assignment of the lease were tendered, he averring his readiness, &c. *Walker v. Harris*, 1 Anstr. 245. So, where A. covenanted to pay seamen's wages yearly, and in consideration thereof B. covenanted to pay A. 42*l.* per month (*Russen v. Coleby*, 7 Mod. 236); and where A. covenanted to do such a thing, B. *doing* or *performing* another, these were construed to be mutual covenants, and not conditions precedent (*Boone v. Eyre*, 2 W. Black. 1312; 1 H. Black. 273, n.); and in a case in which A. covenanted to build a house, and finish it before such a time, and B. in consideration thereof covenanted to pay 380*l.* by instalments as the building should proceed (*Terry v. Duntze*, 2 H. Black. 389); and where A. covenanted to teach B. an art, and B. covenanted as a consideration to pay 25*l.* on a certain day, or sooner, if A. should before that time have instructed him (*Campbell v. Jones*, 6 T. R. 570); and where A. covenanted to serve, and B. to pay so much for service, the same construction was admitted (*Guy v. Nichols*, Comb. 265); and was allowed on covenants contained in an apprenticeship deed; and a refusal by the apprentice to obey his master's lawful commands, was not sufficient to enable the latter to put an end to the contract, his remedy being an action for breach of covenants; and he still remained liable upon his covenants to support and instruct. *Winstone v. Linn*, 1 B. & C. 460; 2 D. & R. 465.

But where a lessor covenanted to put the premises in repair by such a day, and the lessee covenanted to keep them in repair from that time, it seemed doubtful whether these were mutual covenants or not (*Bragg v. Nightingall*, Sty. 140); and the court were also divided in opinion on the point, where A. covenanted to provide timber for repairs, and B. covenanted by a distinct clause to repair. *Brown v. Walker*, 1 Nels. Lutw. 8vo. ed. 139, fol. ed. 119.

Submission to arbitration imports mutual covenants in law. *Lupart v. Welson*, 11 Mod. 170.

And if two deeds of covenant are made at the same time, not having reference to each other, the one shall not be construed as a defeasance of the other; but they are mutual securities. *Clayton v. Kynaston*, 12 Mod. 222; 1 Ld. Raym. 419; 2 Salk. 573. *Lacy v. Kynaston*, 12 Mod. 415; 1 Ld. Raym. 688; 2 Salk. 575; 3 id. 298; Holt, 178, 218.

A deed-poll cannot raise mutual covenants (*Lock v. Wright*, 8 Mod. 40; 1 Stra. 569), but case may lie. *Burnett v. Lynch*, 5 B. & C. 589.

On mutual covenants, performance need not be averred (*Campbell v. Jones*, 6 Term Rep. 570); nor is a plea in defeasance to an action that the plaintiff has not performed the covenants on his part sustainable. *Samways v. Eldsly*, 2 Mod. 74. *Trench (executor, &c.) v. Trewin*, 1 Ld. Raym. 124.

With respect to the necessity of averring performance on mutual covenants or mutual promises, see *Thorpe v. Thorpe*, 1 Ld. Raym. 662; S. C. 1 Salk. 171; S. C. Com. Rep. 88; S. C. 1 Lutw. fol. ed. 88. The form of action was *assumpsit*, and these distinctions (which have repeatedly received the approbation of succeeding judges, *see* 7 Mod. 236; 8 id. 40) were there laid down:—

1st. If a day be appointed for payment of the money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement be to pay the money for the doing of the thing, yet the action may be brought for the money before the thing done, because the agreement is positive that the money shall be paid at the said day.

2d. Though a certain day be appointed for payment of the money, yet if the said day is to incur after the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money.

3d. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

(F) *Precedent, Dependent, and Concurrent.*[1]

4th. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 1 Vent. 147; 1 H. Black. 270.

5th. Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale. 1 Salk. 112, 113; id. 171; 2 Salk. 623; Dougl. 691; 3d edit. id. 684; 4 Term Rep. 761; 6 id. 665; 7 id. 125, 381; 8 id. 366; 2 Saund. 106, 352; 2 H. Black. 178; id. 123; 1 East, 203; id. 619; 4 id. 477; 6 id. 555; 8 Taunt. 62; 1 Moore, 498; S. C.

A covenant to pay an annuity in consideration of a share in a business, and a covenant not to interfere, are independent covenants. *Carpenter v. Creswell*, 4 Bing. 409; 1 M. & P. 66.

A covenant by A. to proceed on a voyage, and obey all instructions, in consideration of B. paying him a proportion of the proceeds, are independent covenants. *Stavers v. Curling*, 3 Bing. N. S. 355; 3 Scott, 740.

Under a covenant to purchase and pay at a certain time, if independent, the conveyance need not be tendered. *Mattock v. Kinglake*, 10 Ad. & E. 50; 2 Per. & D. 343.

In an action brought to recover a sum of money under two deeds of covenant, the declaration stated that, in consideration of the sum of 258,629*l.* 10*s.* 6*d.*, the plaintiff undertook to make a certain railway for the defendants; that afterwards, and during the progress of the work, the plaintiff agreed to complete the railway by the 1st June, 1840, in consideration of the defendants paying him the further sum of 15,000*l.* for such expedition, and on being provided by the defendants with rails, chairs, blocks, &c., to complete the same by the 1st June; provided that, if the plaintiff should not complete the railway by the 1st June, he should pay to the defendants the sum of 300*l.* for the said 1st June, and the like sum for every succeeding day until the whole should have been completed. *Breach*, non-payment of the money by the defendants. *Plea*, as to 7500*l.*, parcel of the 15,000*l.*, that the plaintiff did not complete the railway by the 1st June, and that, by his failing to do so for twenty four days, the defendants had a right to deduct the sum of 7500*l.* from the sum to be paid to him. *Replication*, that the plaintiff was not liable to pay *modo et formâ*. It was proved that the plaintiff did not finish the railway until twenty-four days after the 1st June, but that the defendants had not furnished him with all the rails, chairs, &c. The learned judge directed the jury, that the defendants were bound, as a condition precedent to their right of deducting the 7500*l.*, to have furnished the plaintiff with the rails, chairs, &c.:—*Held*, that this was a misdirection; that the covenants were independent; and that the furnishing of the rails, chairs, &c., by the defendants, was not a condition precedent to their right to deduct; and that, the only question being whether the railway was completed on the 1st June, the plea was established. *M'Intosh v. Midland Counties Railway Co.* 14 L. J. Ex. (N. S.) 338.

[1] A. covenanted to convey lands to B. on a certain day, and B. in consideration thereof covenanted to pay A. 120*l.* on or before that day: these covenants were construed to be dependent. *Glazebrooke v. Woodrow*, 8 Term Rep. 366. *Goodisson v. Nunn*, 4 id. 761.

A declaration stated that the plaintiff and the defendant had agreed to enter into partnership as surgeons until the 1st of January, 1846, for certain considerations therein mentioned; and that it was further agreed that the plaintiff should, after the 1st of January, 1846, introduce the defendant to the patients as his successor in business, and use his best endeavours to establish him in it, in consideration whereof the defendant covenanted to pay a further sum of 50*l.* on the 25th of March, 1846, in addition to another sum covenanted to be paid. *Breach*, non-payment of the 50*l.* *Plea*, that after the 1st of January, 1846, the plaintiff refused to introduce the defendant as the plaintiff's successor to —— &c., wherefore the defendant refused to pay the said sum of 50*l.*:—*Held*, that the plea was bad, as the introduction to the patients was an independent covenant, and not a condition precedent to the payment of the 50*l.* *Judson v. Bowden*, 1 Ex. 162; 17 L. J. Ex. 173.

A gas company covenanted with the defendants to supply their parish with gas, and to light the lamps in the public streets and places every night at sunset, and keep them alight till sunrise, and to pay a penalty of 2*s.* 6*d.* upon each lamp for every day upon which they were neglected to be lighted, the defendants covenanting on the performance of the before-mentioned terms and conditions on the part of the company to pay them 4*l.* 10*s.* per annum for each lamp:—*Held*, that the covenants of the company were independent, and that the performance of them was not a condition precedent to an action on the covenants of the defendants. *London Gas-Light Co. v. Chelsea* (*Vestry*), 8 W. R. 416, C. P.

By a deed of the 11th October, 1842, reciting the grant of letters patent to plaintiff for an invention, and a deed of the 23d July, 1842, by which plaintiff granted to defendant the sole license to make and vend the patent invention, subject to the payment to plaintiff of a royalty, with a proviso for keeping the royalty at an average of 19*l.* 13*s.* 4*d.* per month, and also reciting that defendant

had agreed with plaintiff for the purchase of one-half of the patent, subject to the deed of the 23d July, 1842, but with the benefit to defendant of one-half of the royalty thereby reserved. Plaintiff, in consideration of 2200*l.*, assigned to a trustee for the defendant the letters payment. *Declaration* on a covenant by defendant to pay the 2200*l.* by instalments. *Pleas*, that for several causes the letters patent were void:—*Held*, on demurrer, that the pleas were no answer to the action; first, because defendant being at all events bound to pay the royalty of 16*l.* 13*s.* 4*d.* per month to plaintiff, the consideration did not wholly fail; secondly, because the covenant for payment of the purchase-money was an independent covenant. *Cutler v. Bower*, 11 Q. B. 973; 12 Jur. 721; 17 L. J. Q. B. 217.

By indenture the plaintiff covenanted with the defendant to deliver up a farm on a certain day, and in the meantime to cultivate it on the four-course system, and that on the surrender he would deliver up an agreement to be cancelled, and would surrender all his unexpired time and interest in the farm, and if the defendant required he would at any time afterwards execute any deed for further assurance; and the defendant covenanted that if the plaintiff did deliver up the farm, and in the meantime cultivate the farm on the four-course system, and perform and keep all and singular other covenants, the defendant would, upon delivering up the farm, pay for the manure:—*Held*, that the delivering up of the agreement was not a condition precedent to the plaintiff's right to sue on the covenant to pay for the manure. *Newson v. Smythies*, 3 H. & N. 840; 28 L. J. Ex. 97.

Where A. agreed to transfer stock upon such a day upon payment of 100*l.*, the payment was held to be a concurrent act, and not a condition precedent. *Merrit v. Rane*, 1 Stra. 458. *Elwick v. Cudworth*, 1 Nels. Lutw. 178.

Covenant to grant estate on plaintiff's nominating lives, and to deliver possession at Christmas, is but one covenant, and not distinct or independent. *Twiford v. Buckly*, Carter, 205. See *Clarke's case*, 1 Bulst. 168. *Mattock v. Kinglake*, 10 Ad. & E. 50.

The plaintiffs, by deed, contracted for the supply of gas to the public lanterns of a parish, covenanting that they would, to the satisfaction of the defendants (the vestry), or their surveyor, light each lantern at sunset, and continue the same lighted until sunrise, the gas supplied to be well and sufficiently purified, so that the gas should give a clear, and white, and brilliant light; and the light or flame to be such a light or flame as was known by the name of the large bat's-wing burner, each burner consuming at the rate of five cubic feet of gas per hour at the least; and the defendant covenanted that if the plaintiffs should well and sufficiently light and perform, fulfil, and keep all and singular the covenants in the deed contained on their part to be performed, they, the defendants, would pay out of the funds in their hands, or which they could or might raise or obtain by virtue of the powers and authorities vested in them, unto the secretary of the plaintiffs, a certain sum per annum for each and every lantern so lighted by them. To an action to recover the stipulated annual payments for gas supplied under this deed, the defendants pleaded that the plaintiffs did not, during the period, light the public lanterns, or cause the same to be and continue lighted pursuant to the deed to the satisfaction of the defendants or their surveyor; and that the plaintiffs did not during the period so light the public lanterns during each and every night at sunset, and so continue the same lighted till sunrise; that the light or flame therein was such a light or flame as is known as the large bat's-wing burner, and consumed at the rate of five cubic feet of gas per hour at the least, within the true meaning of the deed:—*Held*, that these matters did not entitle the defendants to refuse to pay for the gas supplied under the contract, the performance of all the several stipulations by the plaintiffs not being a condition precedent to their right to receive the money. *London Gas-Light Co. v. Chelsea Vestry*, 8 C. B. (N. S.) 215.

By a subscription-contract, each of the subscribers covenanted with the plaintiffs to the extent of his subscription, that each had subscribed the sum set opposite to his name for the purpose of establishing a company, and of applying to parliament for an act to incorporate it, and undertook, in the event of the application not being successful, they would pay all the expenses incurred with a view to the establishment. The subscribers thereby acknowledged certain of the subscribers as a committee, and empowered them to manage and dispose of the capital raised in pursuance of the covenant, and to pay and allow all such salaries and recompenses as the committee should deem right; and they also covenanted with the plaintiffs to pay the full amount subscribed, in such sums and at such place and times as should from time to time be required or appointed by the committee:—*Held*, that the covenant with the plaintiffs was an absolute covenant to pay the expenses of the application if unsuccessful, and that it was no answer to say that the subscribers had not been required or appointed by the committee to pay. *Millett v. Browne*, 27 L. J. Ex. 256.

To an action on an indenture of apprenticeship for a breach of covenant by the master in not instructing the apprentice and providing him with food and lodging, he pleaded that the apprentice conducted himself in so dishonest a manner in the defendant's business, and defrauded and robbed the defendant so that it became unsafe for the defendant to continue him in his service, whereupon he dismissed him:—*Held*, on demurrer, that the covenants in the indenture were independent covenants, and, consequently, the plea was bad. *Phillips v. Clift*, 4 H. & N. 168; 5 Jur. N. S. 74; 28 L. J. Ex. 153.

(G) *Alternative.*[1]

(H) *Negative.*[2]

(I) *Usual, or Unusual.*[3] *See* further, Covenant not to Assign, Div. II. 3d. (B) (*b*).

(J) *Joint.*[4]

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[1] A. covenanted to leave as good millstones at the end of his term as were there at the commencement, or else to give satisfaction in money: these are alternate covenants, and if the covenantor cannot perform one, he shall not be discharged of the alternate covenant. *Studholme v. Mandall*, 1 Lutw. 263; 1 Ld. Raym. 279.

If, however, the obligee prevent the performance of one breach, the obligor shall be excused from performing the other. Cro. Eliz. 396, 539. And on a covenant to do either a particular act, or an act to be appointed by a third person, it is incumbent on the person who is to do the act, if he chooses the latter, to procure the appointment. *Lamb's case*, 5 Co. 23, b; Cro. Eliz. 716, 814; Moore, 645.

In covenant, the declaration stated, that it was covenanted and agreed between the plaintiff as lessor, and the defendants as lessees, of certain coal mines, that the plaintiff should, when he thought fit, employ a fit and proper person at each machine for weighing the coals, who should weigh the same and keep the accounts, and that his wages should be paid by the defendants; but that, in case such person should not duly attend at the machine, and duly keep the necessary accounts, the defendants were authorised to discharge him. It then averred that the plaintiff appointed J. H., being a fit and proper person, and alleged as a breach, that the defendants refused to pay him his wages. The defendants pleaded, that J. H. was not a fit and proper person, that he had not duly attended to the machine, and had not duly kept the necessary accounts. At the trial, it was proved that J. H. had been appointed, and had attended for three months, after which period he was dismissed as incompetent by the defendants: —*Held*, that the plaintiff was not entitled to judgment *non obstante veredicto:* the appointment of a fit and proper person being a condition precedent to the defendant's liability to pay wages. *Lawton v. Sutton*, 9 Mee. & W. 795.

In a deed by which A. assigned to B. for a term of years an exclusive license to use a patent after covenants for payment of sums in the nature of royalties, there was the following clause:—"That if shall happen in any year during the term that the royalties or sums of money covenanted to be paid shall not amount to 2000*l.* then B. shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A. such a sum of money as, with the royalties, will amount to 2000*l.* for that year, or if B. shall at any time make default in payment of such sum within the time appointed for payment, then it shall be lawful to and for A., by writing signed by him, and indorsed on the deed or duplicate thereof, to declare that the deed and the license, and power thereby granted, shall cease and determine:—*Held*, that this was not an absolute covenant by B. to pay 2000*l.* a-year during the term, but only empowered A. to put an end to the grant upon non-payment of that sum. *Tileens v. Hooper*, 5 Ex. 830; 20 L. J. Ex. 78.

[2] A covenant to desist from using a certain trade is a negative covenant, which cannot be said to be performed till it becomes impossible to break it. *Humlock v. Blacklow*, 1 Mod. 64; S. C. 2 Saund. 155; 1 Sid. 464; 2 Keb. 674. *Doe v. Marchetts*, 1 B. & Adol. 715.

A plea of performance generally is good where a negative covenant is only *in affirmance* of a preceding affirmative covenant, but not where the negative covenant is *additional* to the prior negative covenant. *Laughwell v. Palmer*, 1 Sid. 87; 1 Keb. 334, 372.

[3] A covenant to repair and rebuild in case the premises are blown down by storms, or burned down by lightning or fire, is not an usual covenant. *Doe d. Ellis v. Sandham*, 1 Term Rep. 705.

[4] Although the words import a joint and several or a several covenant, yet if the interest and cause of action be joint, the covenant shall receive the latter construction. *Eccleston v. Clipsham*, 1 Saund. 155; 2 Keb. 338, 339, 347, 385. *Spencer v. Durant*, 1 Show. 8; S. C. Comb. 115. *Saunders v. Johnson*, Skin. 401. *Johnson v. Wilson*, Willes, 248; 7 Mod. 345.

Thus, where a lessee on a demise to him by tenant for life under a power, covenanted with the tenant for life, and T. C. (a receiver appointed by Chancery), and other the receiver or receivers for the time being, and other the person or persons for the time being entitled to the freehold, &c., and to and with every of them:—It was held that this was a joint covenant, and therefore survived, and that the executrix of the tenant for life could not maintain covenant for breach in her testator's lifetime. *Southcote v. Hoare*, 3 Taunt. 87.

So where M. covenanted with A., his executors, &c., and also with B. and her assigns, to pay A. an annuity during B.'s life, this being a joint covenant, the action survived to B., and could not be brought for non-payment by the administrator of A. during B.'s life, although the benefit of the covenant were for A. only (*Anderson v. Martindale*, 1 East, 497); and where the interest is joint, the action must be brought against all the covenantors. *Kingdom v. Jones*, T. Jon. 150. When several persons covenant jointly, all

(K) *Several.*[1]

(L) *Joint and Several.*[2]

the covenantors must be made defendants (Com. Dig. Pleader, 2 v. 2); but if they covenant jointly and severally, then it is at the option of the covenantee to sue them jointly or severally. *Lilly v. Hedges*, 1 Stra. 553; 8 Mod. 166. *Enys v. Donnithorne*, Burr. 1190.

F. covenanted with A., B., & C., to whom he had severally mortgaged certain unfinished messuages to complete the premises by a given day, and A., B., & C. severally covenanted with F. to make him periodical advances. In consideration of the arrangement thus entered into with F., D. & E. jointly and severally guaranteed to A., B., & C., that F. should duly perform his covenants with them, their joint and several liability under the guarantee not to exceed 100*l.* Default having been made by F.—*Held*, that A., B., & C. might recover to the extent of the 100*l.* in a joint action against D. & E. in respect of damages sustained by them from F.'s breach of covenant. *Pugh v. Stringfield*, 4 C. B. (N. S.) 364.

But though a covenant be joint, yet, if it be broken by the tort of one of the covenantors, the other shall not be charged with this breach of covenant; for, though, on a joint demise by A. and B., an action for breach of the covenant for quiet enjoyment, by the entry of a stranger, must be against both, yet, if one of the covenantors enter tortiously upon the lessee, his act shall not be charged upon the other, but the covenant shall for this purpose be taken as several, and the wrong-doer alone be sued. *Coleman v. Sherwin*, Show. 79; S. C. Carth. 97; S. C. 1 Salk. 137. Upon the whole, therefore, it appears, that where there are several covenantees, they must all join, if their interest be joint, although the covenant be several; but may all sever, if their interest be several, although the covenant be joint; and that when there are several covenantors they must all be joined, where the covenant is joint and not several; but may either be joined or sued separately, when the covenant is several as well as joint. Comyn's *Landl. and Ten.* 395, 6.

But if a joint deed be signed by one of the parties only, an action against that one may be supported. *Bidwell v. Lethbridge*, Barn. 235.

[1] Where the interest of the parties is several, the covenant shall be taken to be several, although in terms it imports a joint covenant. *James v. Emery*, 8 Taunt. 245; 2 J. B. Moore, 195; 5 Price, 529. This proposition has received confirmation from the late case of *Withers v. Bircham and another*, 3 B. and C. 254; S. C. 5 D. and R. 106; in which, after reciting the grant of two distinct annuities to A. and B. during the life of the grantors, and the survivor, the indenture witnessed that C. covenanted with A. and B. and their executors, to pay the annuities or either of them when the grantors should make default in payment. A. died: the court held that the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executors might maintain an action against C.

Thus, where part-owners of a ship agreed "each and every of them with the others, and each and every of the others, that the ship should proceed on a voyage," the ship's husband (one of the parties) was held liable to an action by either of the parties, as the covenant was clearly several. *Owston v. Ogle*, 13 East, 538.

[2] A covenant by A. and B. for themselves and every of them, is joint and several. *May v. Woodward*, Freem. 248. *Bolton v. Lee*, 2 Lev. 56; 3 Keb. 39, 50. *Robinson v. Walker*, 7 Mod. 153; 1 Salk. 393.

And although the interest of two lessees be joint, yet if their covenant for payment of rent, &c., be joint and several, the executors of one lessee deceased may be sued alone (*Enys v. Donnithorne*, 2 Burr. 1190), because they are sureties for each other for the due performance of the covenants; and it is as competent for each of them to covenant for the other, as it is for a stranger to covenant for both, which is a usual thing. *Lilley v. Hedges*, 1 Stra. 553; S. C. 8 Mod. 166. And even if the covenant were joint, and an action brought against one of the covenantors, he could only take advantage of it by a plea in abatement. For the distinction which runs through all the cases is between actions brought *by* one of several covenantees, obligees, or *by* one of several with whom any contract, whether in writing or parol, is made, and actions brought *against* one of several joint-covenantors, obligors, or contractors. In the former case the action must be brought by all the parties. For where there are several covenantees or obligees, and one of them only brings an action, without averring in the declaration that the others are dead, the defendant may either take advantage of it at the trial as a variance upon the plea of *non est factum*, or pray oyer of the deed and demur generally. *Slingsby's case*, 5 Rep. 9. *Eccleston v. Clipsham*, 1 Saund. 153. *Leglise v. Champante*, 2 Stra. 820. *Vernon v. Jeffreys*, id. 1146. *Cabell v. Vaughan*, 1 Saund. 291, n. 4; S. C. 1 Vent. 34. *Saunders v. Johnson*, Skin. 401; Com. Dig. Pleader (2 V. 2); Bull. N. P. 158. *Osborn v. Crosbern*, 1 Sid. 238. *Holdwich v. Chafe*, All. 41.

And joint and several covenants in the beginning of a lease shall extend to all the subsequent covenants on the part of the covenantors, unless there be something in the nature of the subject to restrain them to the former part of the lease. *The Duke of Northumberland v. Errington*, 5 Term Rep. 522. *See* in Equity, 2 Mer. 30; 3 Ves. 399.

(M) *Joint, as to the Interest Conveyed; and Several, as to the subsequent Acts of the Parties.*[1]

(N) *Valid or Illegal.*

(*a*) *Valid.*[2]

May v. Tyre, Freem. 447; *nom.* Mayhur v. Try, 3 Keb. 764, 780.

A covenant to pay an annual sum is good, although the consideration (which is recited in the deed) prove void.

A deed recited that the plaintiffs had assigned a patent to the defendant (which patent proved afterwards to be void), and the defendant covenanted to pay 470*l.* per annum for seven years.

The court held that the defendant was liable to the payment, notwithstanding the avoidance of the patent; for the recital of the patent was only the consideration, and, if there were no consideration, yet the covenant would be good.

See 1 Roll. Rep. 199; Yelv. 19, 23.

(*b*) *Invalid, and Causes of Invalidity.*

1*st. Contrary to General Policy.*

(*a*) *Husband and Wife.*

Jones v. Morley, Carth. 410; 4 Mod. 261; 2 Salk. 677; 1 Ld. Raym. 287.
Mudge v. Mudge, 1 Com. 333.

Covenants between husband and wife cannot be supported.[3]

Husband and wife being by law considered as one person, cannot with effect covenant with one another.

See Co. Litt. 112, a.; 2 Vern. 385; 4 Hen. 7; 3 Atk. 72.

[1] The word *dimiserunt* implies, as to the interest, a joint covenant, but as to the subsequent acts of the lessors a several covenant. *Coleman v. Sherwin*, 1 Salk. 137. 1 Show. 79; Comb. 163; Carth. 97.

A covenant by L. to pay rent, and by the defendant to secure it, is a joint covenant that both shall pay. *Copeland v. Laporte*, 3 Ad. & E. 517.

A covenant to indemnify the parish against a servant becoming chargeable to the parish is legal. *Walsh v. Fussel*, 6 Bing. 163; 3 M. & P. 457.

[2] A proviso for re-entry on the bankruptcy of the lessee is good (*Roe d. Hunter v. Galliers*, 2 Term Rep. 133); and so is a covenant by a friend of a bankrupt to pay the creditors all his debts in full, in consideration that no further proceedings shall be taken under the commission. *Kaye v. Bolton*, 6 id. 134.

It appears also that a covenant by B. with the sheriff, that the goods of one indicted for killing a man shall be forthcoming upon conviction, may be supported. *The Sheriffs of London v. Prettiman*, Freem. 326.

[3] A man cannot grant or give his tenements to his wife, for by no conveyance at the common law could a man during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seized to the use of his wife, or make feoffment or other conveyance to her use; and now the estate is executed to such uses by the statute of 27 Hen. 8, c. 10; for an use is but a trust and confidence which, by such means, might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her, for his wife and he are but one person in law. It is also generally true, that all compacts made between husband and wife when single are voided by the intermarriage (Cro. Car. 551); and it operates as an extinguishment of all debts due from the husband to the wife. Co. Litt. 264, b. But a bond conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. *Milbourn v. Ewart*, 5 T. R. 381. But although the husband cannot convey to the wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold estate to her use. Co. Litt. 112, a; 4 Co. 29.

Where a husband covenanted to pay trustees an annual sum for his wife's use in case of their future separation, with the consent of the trustees, this has been deemed a valid covenant. *Rodney v. Chambers*, 2 East, 283. S. P. *Gawden v. Draper*, 2 Vent. 217.

But it appears that a covenant by a husband to pay a trustee an annuity in case the wife should live apart from her husband, is void, as being a deed made in contemplation of a future separation at the pleasure of the wife, and contrary to the policy of marriage. *Durant v. Titley*, 7 Price, 577.

In the case of *Guth v. Guth*, 3 Bro. C. C. 614, specific performance was decreed of ar-

2d. In Restraint of Trade. *See* Bond, vol. ii. p. 517.

CLERK v. CROW, 2 Barnard, 463.

An agreement not to exercise a trade within certain limits is good, although in restraint of trade.[1]

Error on a judgment in the Common Pleas, in an action brought on articles, by which the defendant agreed not to exercise a certain trade within the weekly bills of mortality. It was said that such agreement was determined to be good in the case of *Jasper and Lamper*, Hill, 13 Geo. 1; and likewise in the case of *Mitchell v. Reynolds*, 1 P. Wms. 181; S. C. 10 Mod. 130; S. C. Fort. 296; for which reason the court affirmed the judgment directly.

3d. In Restraint of Marriage.[2] *See* also Bond, vol. ii. p. 517.

4th. On the ground of Fraud.[3]

5th. In Contravention of an Act of Parliament.[4]

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ticles of separation at the suit of the wife, to allow her the separate maintenance agreed upon, though the husband offered by his answer to receive her again. Mr. Belt, speaking of the case of *Guth v. Guth*, says, "The present decision has always been disapproved of, and *Lord Eldon, C.*, has observed (11 Ves. 532) that it was the only instance in which a court of equity did enforce such a deed. A provision, therefore, by any instrument for the separate maintenance of a wife, in the event of any *future separation*, whether with or without the intervention of trustees, would now, it seems, be incapable of being enforced either at law or equity. With regard to the interference of a court of equity, referable to contracts of separation between husband and wife, operating *in præsenti*, it is observable, that although courts of equity disclaim to enforce the agreement as to the point of actual separation, they will yet in general cases oblige a husband to perform that part of it which relates to the payment of the separate maintenance thereby stipulated. *Sir W. Grant, M. R.*, in the recent case of *Worrall v. Jacob*, 3 Meriv. 268, &c., noticed the perplexities in which the court had found themselves involved by thus enforcing the minor and auxiliary part of the agreement, whilst they professed to repudiate the principal and essential part and motive of it. Besides this, the point seems even yet unsettled, whether the courts will interfere even as to the stipulated immediate maintenance, if the contract rest only as between the husband and wife, without the interposition of trustees. Lord Loughborough and Lord Eldon much doubted whether the courts should do so; but the question has not been settled, although Mr. Roper, in his work on the law of Baron and Feme, vol. i. 293, &c., thinks great weight is due to this case of *Guth v. Guth*, as a deliberate decision. *See* 11 Ves. 532, 533; 2 Sp. 528. *Wilson v. Wilson*, 1 H. L. C. 538; 5 id. 51, 61, 62. *Sanders v. Rodway*, 16 Beav. 207.

[1] Although a covenant not to use a trade anywhere in England is void, as being too general a restraint (*Prugnell v. Gosse*, All. 67); but it seems that a covenant not to use a trade with particular customers by name, is valid. *Mitchell v. Reynolds*, 1 P. Wms. 181.

Thus, where an attorney covenanted to relinquish his business in favour of B., an attorney, and not to practise afterwards within 150 miles, and to recommend B. to his clients, to permit B. to use his (the covenantor's) name in the firm for valuable consideration, this was held to be a valid covenant (*Bunn v. Guy*, 4 East, 190; 1 Smith, 1). And where, on a dissolution of partnership, A. covenanted not to make cordage, except on government contracts, and B. covenanted to allow A. 2*s.* per cwt. for all cordage sold to A.'s friends on his recommendation, with a proviso that B. should not be bound to make cordage for, or trust such of the friends as he should be disinclined to give credit to; and A. covenanted to employ B. exclusively in making cordage for him; it was held that A. might work for the friends refused to be trusted by B., and that this was not a covenant in restraint of trade, and therefore not void. *Gale v. Reed*, 8 East, 80. *See ante*, vol. ii. p. 517.

[2] A covenant in restraint of marriage is void. *Lowe v. Peers*, 4 Burr. 2225. *See ante*, vol. ii. p. 517.

[3] Covenants have also been invalidated on the ground of fraud. Thus A., who held an office for life in the gift of B., agreed with C. to resign and to procure the appointment for him; and C., in consideration thereof, agreed that A. should have a moiety of the profits. A. resigned, and through his influence C. was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office, it was held that the agreement was a fraud upon B., and, therefore, illegal and void. *Waldo v. Martin*, 4 B. & C. 319. See *Card v. Hope*, 2 B. & C. 661; 4 D. & R. 164.

[4] A covenant for ease and favour of persons under arrest or attachment is void, under the 23 Hen. 6, c. 9. *Mosdel (Marshal) v. Middleton*, 1 Vent. 237; T. Raym. 222; 1 Saund. 161. And so is a covenant against the statute of gaming, 16 Car. 2, c. 7. *Edgebury v. Rosindale*, 2 Lev. 94; 1 Vent. 253.

6th. Inconsistent with other Parts of the Instrument, or Repugnant or Uncertain.[1]

7th. When the Deed on which the Covenants are dependent is Void.[2]

NORTHCOTE v. UNDERHILL, 1 Salk. 199; 1 Ld. Raym. 388; Holt, 176. CAPONHURST v. CAPONHURST, 1 Lev. 45; Raym. 27; 1 Keb. 130, 164, 183.

The defendant granted, bargained, and sold certain lands to the plaintiff and his heirs, provided, if the grantor should pay so much money, it should be lawful for him to re-enter; and he covenanted to pay so much money to the plaintiff, and a breach was assigned for non-payment. The deed proving void for want of enrolment, it was insisted in an action of covenant that the covenant was also void.

Sed per Cur. Though nothing passes by the deed, yet the covenant to pay the money is good, and does not depend at all upon the passing of the estate by the deed. In this case, the covenant to pay the money is a distinct, separate, and independent covenant.—Judgment for the plaintiff.

8th. Where Party personally Liable on his Covenant, though the Deed containing it be Void.[3]

Semble, that a covenant to pay money within a year after A.'s admission to a certain office was not under the stat. 5 & 6 Edw. 6, c. 16. *Daws v. Pindar*, 2 Mod. 45; 3 Keb. 26; 1 Freem. 175.

[1] The plaintiff covenanted with A., B., C., D., churchwardens and overseers of the parish of St. B., to do certain works and repairs, and A., B., C., D., in consideration thereof, for themselves and their successors, covenanted with the plaintiff that they the churchwardens and overseers, their successors and assigns, should and would pay the plaintiff, his executors, &c., 1169*l.*, at certain times specified. The deed contained a proviso that nothing therein contained should extend, or be construed to extend, to any personal covenant, or affect A., B., C., D., or any of them, in their private capacity:—*Held*, that the proviso was void as repugnant to the covenant, and that the churchwardens and overseers were personally liable on it. *Furnivall v. Coombes*, 6 Scott, N. R. 522; 5 Man. & G. 736; 7 Jur. 399; 12 L. J. C. P. 265. S. P. *Uthwatt v. Elkins*, 13 Mee. & W. 772.

A party to a deed of family arrangement thereby covenanted that if he should at any time become entitled to property exceeding the value of £ (which was left in blank) he would settle it upon certain specified trusts. Before any such property accruing to the persons entitled under the trusts were ascertained, he filed a bill to have it declared that the covenant was void for uncertainty:—*Semble*, that there was no such uncertainty as to render the covenant void. *Fife v. Arbuthnot*, 1 De Gex & J. 406; 3 Jur. N. S. 651; 26 L. J. Ch. 646.

A covenant referring to and inconsistent with a recital which occasions it shall not be binding. *George v. Butcher*, 2 Vent. 140.

[2] If a deed be void, the covenants, if relative and dependent, are also void. Thus, covenants in an indenture in contravention of the statute against the sale of offices (*Ellis v. Ruddle*, 2 Lev. 151; 3 Keb. 552), or the 5 Eliz. c. 4, relating to apprentices, are invalid. *Guppy v. Jennings*, 1 Anstr. 256.

And where the deed is void, a covenant for payment of rent is also void (*Frontin v. Small*, 2 Ld. Raym. 1418; Stra. 705. *May v. Trye*, Freem. 447; *nom. Mayhur v. Try*, 3 Keb. 764, 780); and if an award be void, so also are the covenants for performance of it. *Johnson v. Wilson*, Willes, 248; 7 Mod. 345.

[3] But a covenant which is distinct and independent may be supported, although in a deed in other respects simoniacal and void. *Sed quære? Pike v. Pullen*, Letw. 122. For instance, if a grant of an annuity charged by a rector on his benefice be void under the stat. 13 Eliz. c. 20 (*Mouys v. Leake*, 8 Term Rep. 411), or if the mortgage deed of a ship be void for omitting to recite the certificate of registry, still the covenantor is personally liable on his covenant for payment (*Kerrison v. Cole*, 8 East, 231); and a covenant by a lessee to pay the property-tax, though void by the 46 Geo. 3, c. 65, s. 115, 195, will not avoid a separate covenant for payment of rent clear of all parliamentary taxes generally, for that must be understood of such taxes as the tenant might lawfully covenant to pay (*Gaskell v. King*, 11 East, 165. *Wigg v. Shuttleworth*, 13 id. 87). Nor will the same statute avoid an independent covenant if the grantor of an annuity covenant to pay the same without any deduction in respect of the property or income-tax; for the act (which is retrospective) only avoids the annuity so far as relates to the deduction of the property-tax, but not with reference to the payment of the annuity after the deduction. *Readshaw v. Baiders*, 4 Taunt. 57. *Fuller v. Abbott*, id. 105. *Howe v. Synge*, 15 East, 440. *Morgan v. Edwards*, 6 Taunt. 394; 2 Marsh. 96.

(c) Where Valid in part and Invalid in part.

Mosdel v. Middleton, 1 Vent. 237; T. Raym. 222; 1 Saund. 161; 3 Keb. 133; S. C. 1 Sid. 383.

A covenant, though in part against common law, may be good in the other part.[1]

Per Hale. The condition of a bond or covenant may, in part, be against the common law, and stand good in the other part.

II. Of the Construction of Covenants.

1st. General Rules of Construction.

(A) *Intention of the Parties.*[2]

(B) *To be taken most strongly against the Covenantor.*

Browning v. Wright, 2 B. & P. 22. Dann v. Spurrier, 3 id. 399. Flint v. Brandon, 1 N. R. 78. Doe d. Webb v. Dixon, 9 East, 15. Love v. Pares, 13 East, 85. Earl of Shrewsbury v. Gould, 2 B. & A. 494. Charlton v. Driver, 5 J. B. Moore, 59. Fowle v. Welch, 1 B. & C. 35.

Construed most strongly against the covenantor.[3]

Where any ambiguity arises the covenant shall be taken most strongly against the covenantor. *See* Shep. Touch. 166.

2d. Of their Construction as they regard the extent of the Party's Liability; as,

(A) *General or Absolute.*

Cooke v. Founds, 1 Lev. 40; S. C. 1 Keb. 95.

A covenant that B. is seised in fee, according to the indenture made by W.

The defendant bargained and sold to the plaintiff, and covenanted that he was seised of a good estate in fee, according to the indenture made to him by W.

Per Cur. "The covenant is absolute; that he is seised of a good estate in fee, and reference to the conveyance by W. serves only to denote the limitation

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[1] When that which is good and that which is void are put together in the same grant, the common law makes such a construction, that the grant shall be good for that which is good, and void for that which is void: *Per Hutton*, J. Ley's Rep. 79; cited by *Lawrence, J.*, 8 East, 236; Selw. N. P. 5 ed. 464.

[2] A covenant shall receive its construction according to the intent of the parties (*Griffith v. Goodhand*, T. Jon. 191; Skin. 39; T. Raym. 464. *Duke of Northumberland v. Errington*, 5 Term Rep. 522. *Iggulden v. May*, 7 East, 237; 3 Smith, 269; 2 N. R. 449. *Gale v. Reed*, 8 East, 80. *Howell v. Richards*, 11 East, 633. *The Duke of St. Albans v. Ellis*, 16 East, 352. *Nind v. Marshall*, 3 J. B. Moore, 703; 1 B. & B. 319), and shall be expounded and taken from the whole instrument, not according to particular expressions, but the exposition shall be *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words. Shep. Touch. 106; Plowd. 329; Moore, 58; Winch. 93. Nor is it at all material in what part of a deed any covenant is inserted, for in the construction of it the whole deed must be considered in order to discover the meaning of the parties: *Per Buller, J.*, 5 T. R. 526. *Mayor of Liverpool v. Tomlinson*, 7 D. & R. 556. Thus, if A. covenants to deliver up a recognisance to be cancelled on payment of 10*l.* on a certain day, an extent upon the recognisance is a breach (*Robinson v. Aunts*, T. Raym. 25; 1 Sid. 48); and exposition has been made contrary to grammatical construction (*Fountain v. Guavers*, 2 Show. 333; S. C. Comb. 59; S. C. Skin. 146); and if in the conjunctive, one may restrain and limit another. *Milner v. Horton*, 1 M'Cl. 647.

[3] Mr. Cruise, in his *Digest*, vol. iv. p. 394, adds the two following general rules for the construction of covenants: 1st. That they shall be so interpreted, *ut res magis valeat quàm pereat*; 2d. When no time is limited for their performance, they must be done within a reasonable time; and cites as an authority, Shep. T. 166.

The general principle in the text has been applied to the construction of leases; hence it has been holden, that under a lease for fourteen or seven years, the lessee only has the option of determining at the end of the first seven years. *Doe d. Webb v. Dixon*, 9 East, 15; in which the authority of *Dann v. Spurrier*, 3 B. & P. 399, 442, was recognised.

and the quality of the estate, and not the defeasibleness or indefeasibleness of the title." is an absolute covenant.[1]

(B) *Qualified.*

Deering v. Farrington, 1 Mod. 113; 3 Keb. 304; Freem. 367. Gainsford v. Griffith, 1 Saund. 58; 1 Sid. 328. Hayes v. Bickerstaffe, Vaugh. 118.

A particular express covenant that the assignee shall quietly enjoy against all claiming under the assignor will restrain a general implied covenant. But a particular express covenant will restrain a general implied covenant.[2]

[1] The declaration in covenant alleged that the plaintiff, being the lessee of a coal-mine, underlet his interest in the same to the defendants, who covenanted to raise and work 13,000 tons of coal in each year, and pay at the rate of 8*d.* per ton royalty for the same, or pay that amount of money, namely, 433*l.* 6*s.* 8*d.* as fixed rent, whether the coals should be wrought or not, and also 9*d.* for each ton over and above that quantity, to whatsoever extent the same might be wrought. *Breach*, that the defendants had not raised 13,000 tons in each year, and paid at the rate of 8*d.* per ton for the same, or paid 433*l.* 6*s.* 8*d.* as fixed rent. The defendants, after setting out the indenture on oyer, pleaded that, by the fair and proper working and getting of the coal claimed, the same was, before and at the commencement of the said half-year, greatly exhausted, and a small portion thereof only, being less than a fourth part of such 13,000 tons, was left, and remaining to be worked and raised:—*Held*, on demurrer, that this was an absolute covenant by the defendants that they would raise 13,000 tons of coal yearly; or, if not, that they would pay the fixed rent; and that there was no implied condition that there existed coals to the amount of 13,000 tons yearly capable of being worked. *Bute (Marquis) v. Thompson*, 13 Mee. & W. 487; 14 L. J. Ex. N. S. 95.

A. agreed to purchase an estate from B. for 46,000*l.*, and by deed covenanted to pay the purchase-money by instalments, at the times and subject to the provisoes and agreements, and in the manner thereinafter expressed; that is to say, 168*l.* on every 24th of June, and the 24th of December, until 1884, the first instalment to be paid on the 24th of June, 1855, and that in case either of the instalments should not be paid upon the day appointed, or within one month after, A. would pay B. interest, to be computed from the 24th of June or the 24th of December, as the case might be, upon which the instalment should have become payable, provided that no instalment payable pursuant to the covenant should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced, until after the expiration of one month from the day upon which the same shall have become payable:—*Held*, that the proviso that no action should be brought for a month did not operate merely as a covenant not to sue, but that the effect was to extend the period for payment for one month, and therefore that no action was maintainable until the month had expired. *Foley v. Fletcher*, 8 H. & N. 769; 5 Jur. N. S. 342; 28 L. J. Ex. 100.

[2] Covenant, therefore, cannot be maintained on the implied general covenant arising out of the words "demise and lease," where there is an express limited covenant. *Merrill v. Frame*, 4 Taunt. 329.

A prior general covenant will be restrained by a subsequent agreement that the covenants shall not extend beyond the acts of the vendor and his heirs (*Brown v. Brown*, 1 Lev. 57); and where a surety in a lease covenanted that the lessee should pay the rent on the days mentioned, and in case he should neglect for forty days, the surety would pay on demand: the latter covenant qualified the former, and therefore a breach assigned generally for non-payment as if the covenant were absolute was held bad. *Sicklemore v. Thistleton*, 6 M. & S. 9. But a general preceding covenant that the lease is an indefeasible lease (*Gainsford v. Griffith*, *supra* in text), or that the vendor has right to grant, shall not be restricted by a subsequent limited covenant for enjoyment. *Norman v. Foster*, 1 Mod. 101; 3 Keb. 246. If, therefore, a term (which is determinable by the death of A.) is recited in the assignment as an absolute term, and is assigned as such, and A. dies after the covenant, in consequence whereof the lease determines, the covenant that the lease is good is broken. *Barton v. Fitzgerald*, 15 East, 530. And where A. assigned certain shares of letters patent to B., and covenanted that he had good right to assign the said shares, and that he had not directly or indirectly forfeited any right or authority he ever had or might have over the same, the court held that the former general part of the covenant was not restrained to the covenantor's own acts by the concluding words. *Hesse v. Stevenson*, 3 B. & P. 565.

If two covenants are of the same nature, a qualification prefixed to the first shall extend to the second. *Bailey v. Munne*, 3 Lev. 46. It was held, therefore, where an assignor of a lease covenanted that he had not done any act to incumber, and that, notwithstanding any such act, the lease was good and subsisting, *and that* he had good right to assign *in manner aforesaid*, that the covenant that he had good right to assign was not a general covenant, but qualified and restrained to the covenantor's own acts (*Foord v. Wilson*, 8 Taunt. 543; 2 J. B. Moore, 592); the general terms, however, of a covenant having a distinct object,

HUGHES v. BENNET, Sir Wm. Jones, 403.

Whether one covenant restrains another is always a question of construction.

A. covenanted that he would convey certain lands, which, notwithstanding any act done by him, he had good right to convey, and that they were of the annual value of 200*l.*

Per Cur. "The second part of the covenant is absolute, and not restrained by the former to any act done by the covenantor."

3d. Of the Construction of Particular Covenants.

(A) *Agricultural and other Special Covenants contained in Leases.*[1]

BURMAN v. ASTON, 1 Lev. 144.

On a lease of gravel-pits in Blackacre, and covenant not to dig gravel there, held, the covenant extended to other pits in Blackacre besides those demised.[2]

The lessor covenanted in a lease made by him to the plaintiff, of certain gravel-pits in Blackacre, that he, his heirs, assignees, or under-tenants, would not dig or sell any gravel there; and a breach was assigned, that an under-tenant did dig and sell gravel in other pits in Blackacre.

It was objected, that the covenant extended only to the pits demised, and not to other pits.

Sed per Cur. It ought to be intended of all the other pits in the close, and not only of the pits demised to the plaintiff; for, in them the lessor had nothing to do before the term ended.—Judgment was given for the plaintiff.

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as for quiet enjoyment, shall not be restrained by words of qualification annexed to preceding covenants, as those for good title and right to convey (*Howell v. Richards*, 11 East, 633); nor shall the generality of a covenant that lands are of a certain yearly value be restrained by one preceding, that the covenantor has good right to convey, notwithstanding any act done by him. *Hughes v. Bennet, supra* in text.

A. conveyed certain premises to B. in fee, and warranted them against himself and his heirs, and covenanted that, notwithstanding any act by him, he was seised in fee, *and that* he had good right to convey *in manner aforesaid*. He then began a new covenant to make a cartway, and that B. should quietly enjoy, without any let from himself or any claiming under him, and that he and his heirs, and all claiming under him, should do all acts for further assurance. It was held that the covenant that B. had good right to convey, was either part of the preceding limited covenant, or if not, was, by the context of all the other covenants, restrained only to the acts of himself and those claiming under him. *Browning v. Wright*, 2 B. & P. 13.

So, where the assignor of a lease covenanted that, notwithstanding any act by him, the lease was valid; *and further*, that it should be lawful for the assignee to enjoy without the lawful let, &c. of the assignor, his executors, &c., *or any other person or persons whomsoever* claiming any estate in the premises, *and that* clearly discharged by the assignor, his heirs, &c. from all former incumbrances suffered by him or by their acts: then followed a covenant for further assurance by the assignor, his executors, &c., and all persons claiming under him:—*Held*, that the generality of the covenant for quiet enjoyment was restrained by the restrictive words in the preceding and following covenants, and was confined to the defendant's acts, and those claiming under him. *Nind v. Marshall*, 3 J. B. Moore, 703; S. C. 1 B. & B. 319.

[1] At common law it is not waste to leave land uncultivated; there must be some contract, express or implied, to observe the rules of good husbandry. What shall be considered in farming as a good and husband-like manner must vary exceedingly according to soil, climate, and situation; and, therefore, the custom of the country, with reference to good husbandry, must be applied to the approved habits of husbandry in the neighbourhood under circumstances of the like nature. *Legh v. Hewitt*, 4 East, 154. All consideration of the custom of the country is excluded by the express stipulations of the lease. 2 Bli. P. C. 156.

Under a particular charging a defendant with non-cultivation of the demised premises evidence of bad cultivation is not admissible, non-cultivation signifying leaving the land waste. 2 Scott, N. R. 685. *See* 7 Ad. & E. 540.

[2] And where a lessee covenanted not to dig gravel out of any part of the demised premises, without consent of the lessor, or paying him 10*s.* a load, except what should be dug out of two acres, part of the premises demised, and by indorsement on the lease before execution it was agreed that the lessor might let any part of the demised premises for the purpose of making bricks, he paying the lessee 3*l.* for every acre so to be let; and further, that the lessee might dig for gravel any part of the demised premises, he covenanting to pay 20*l.* for every acre he

BEATY v. GIBBONS, 16 East, 116.

Under a covenant by an out-going tenant that the manure should be left on the farm, it belongs to the tenant till valued.

The lessee of a farm covenanted with his landlord that he (the tenant) at the end or expiration of his term, should sell and dispose of all such dung and compost, as should then be upon the premises, to the lessor, or to the succeeding tenant. The in-coming tenant took away and used part of the dung.

Per Cur. The out-going tenant being bound by his covenant not to carry away the dung, which was his property, from the premises, but to sell it to the in-coming tenant; the effect of the covenant is, that he must, in the meantime, have a right of on-stand on the farm for it, till he can sell it to the in-coming tenant, and the property must remain in him to enable him to sell it. Trespass may be maintained against the in-coming tenant for taking it away.[1]

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should so dig, and make good the same. It was held that the lessee was not entitled to dig for gravel in the two acres without making them good. *Flint v. Brandon*, 1 N. R. 73.

The court decided, that a covenant that J. S. should elect twenty of the best trees within eleven years was broken by the covenantor's cutting trees within that period, even for house-bote (*Motteram v. Jolly*, 1 Vent. 271; 3 Keb. 477, 493; 2 Lev. 142; Freem. 397); and that a covenant by a lessee to grind all his corn at his lessor's mill was not restrained to corn grown on the premises. *Hamley v. Hendon*, 12 Mod. 327.

A covenant by a tenant for twenty-one years not to cut down any coppice of less than ten years' growth, or at unreasonable times, but at the end of the term the landlord agreed to pay the value of *all such* growth of coppice as should be then standing and growing, was held, according to its grammatical construction, to bind the landlord to pay for coppice of less than ten years' growth. *Le Blanc* dissentient. *Love v. Pares*, 13 East, 80.

And where A. covenanted to pay 5*l.* for every acre ploughed, eared, or converted into tillage during the last twenty years of the term granted, the sum was payable for every acre, whether first ploughed within the twenty years or before that time. *Birch v. Stevenson*, 3 Taunt. 469.

[1] If tenant covenant to sell the dung at the end of his term to his landlord or succeeding tenant, the effect of such covenant is to give the outgoing lessee a right of on-stand for his manure on the farm; and trespass is maintainable against the in-coming tenant for removing and using part of it. *Beaty v. Gibbons*, *supra* in text.

A lessee covenanted that he would furnish his landlord and tenants with lime at a given price, for improving their lands, at all times and seasons of burning lime. This was held to constitute an implied covenant on his part to burn lime at all such seasons; and a plea that there was no lime burned on the premises out of which the lessor could be supplied, was held to be no defence to an action on the covenant. *Earl of Shrewsbury v. Gould*, 2 B. & A. 487.

A covenant to manure the premises with two sets of muck within six of the last years of the term, the last set of muck to be laid on the premises within three years of the expiration of the term, was considered satisfied by the lessee's laying on two sets within the last three years of the term. *Pownall v. Moores*, 5 B. & A. 416.

The defendant demised to the plaintiff for twenty-one years a mansion-house and land, with the sole license of shooting and sporting over all other lands, plantations, and coverts of the defendant, subject to the liberty for each tenant on his farm to kill rabbits with ferrets only. The defendant covenanted for quiet enjoyment, and that if, at any time during the term, any of the tenants of the defendant of any such lands, plantations, coverts, &c. should obstruct the plaintiff in the enjoyment of the said license, or should destroy the game, rabbits, &c., then the defendant would, upon the requisition of the plaintiff, give notice to quit to such tenants, and enforce the notice by such legal measures as should be necessary. *Breach*, that, after the demise to the plaintiff, the defendant demised to T. R. for the term of twelve years, 100 acres of the plantations on which the exclusive right of killing rabbits had been granted to the plaintiff, without any clause in the demise to prevent the said T. R. from obstructing the plaintiff in the enjoyment of the said license, or from destroying rabbits, and without reserving to the defendant the power of giving T. R. notice to quit, or of enforcing such notice by such legal measures as should be necessary, the said plantations not being at the time of the demise to the plaintiff parcel of any farm; and that the said T. R. did afterwards kill and destroy divers rabbits. The defendant in his plea set out the lease on oyer, which contained, amongst other things, the demise of certain lands and pools, "for the better description whereof a plan is indorsed on the second skin of these presents;" the plan was not set out on the oyer. The defendant then pleaded, that the said rabbits so killed by T. R. were killed by him on his own farm, with ferrets only:—*Held*, on demurrer to the plea, that the exception as to killing rabbits extended, not only to farms existing at the time of the demise to the plaintiff, but also to farms subsequently created. *Newton v. Wilmot*, 8 Mee. & W. 711.

(B) *Not to Assign or Underlet without License.*[1]

Semble, that where there is a covenant not to assign, except by will, without leave of lessor, executors cannot assign for payment of debts without leave;

Lloyd v. Crispe, 5 Taunt. 249.

If a covenant not to assign contain an exception in favour of an assignment by will, *semble*, that executors claiming under the will are not within the exception, so as to be at liberty to sell for payment of the testator's debts without leave of the lessor. See *Parry v. Herbert*, Leon. 5.

and if a lessee covenants for himself, his executors and administrators, not to assign, and becomes bankrupt, and after acquires the demised premises through the assignee of his assignees, and again assigns, this is no breach of his covenant, as he is in of an entirely new estate, and the covenant did not mention *assigns*.

Doe d. Cheere v. Smith, 5 Taunt. 795; 1 Marsh. 359.

R. covenanted with his lessor, that he, his executors or administrators (not naming assigns), would not, during the term, grant, let, or assign the indenture of lease, or the premises thereby demised, or grant any under-lease thereof; and the deed contained a provision for re-entry on non-performance of covenants. On the bankruptcy of the lessee, his assignees assigned the premises to P., who assigned over to R. (the original lessee), who underlet the messuage to the defendant; and an ejectment was brought on this supposed forfeiture of the lease by breach of the covenant.

Per Cur. The bankruptcy of the lessee, and the acceptance of the term by the assignees, expressly absolved the lessee from all the covenants contained in the lease, under the statute of the 49 Geo. 3, c. 121, s. 19, which says, "that the bankrupt shall not be liable to be sued in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained;" the covenant, therefore, of R. was at an end, and as the interest which he transferred to the defendant was not his (R.'s) original estate, but was vested in him in a new capacity, viz. as assignee by purchase, this under-lease cannot be construed to be a forfeiture.

(*a*) *Waiver of Forfeiture.*

A breach of

Goodright d. Walter v. Davids, Cowp. 803.

Among other things contained in an indenture, there was a covenant that

[1] The power of alienation and right to assign being incident to the estate of every lessee, although the word *assigns* be *omitted* (15 Ves. 264), an express restrictive covenant that the lessee shall not assign or underlet without license, is frequently introduced in leases (2 T. R. 138), in order to secure to the lessor a responsible tenant. Where the lessee covenanted "for himself, his executors and administrators, not to let, set, or assign over the whole or any part of the premises, without leave in writing first had and obtained," on pain of forfeiting the lease, the lessee, in defiance of such a covenant, cannot underlet without incurring a forfeiture, although for a less period than the original term. Id. 425.

And a parol license to let a portion of the premises will not discharge the lessee from the restriction imposed by such a proviso (id.); but where the covenant was "that the lessee should not assign, transfer, or set over the said premises, or any part thereof, without license," an under-lease for part of the term was decided to be no breach of the covenant. 3 Wils. 234.

Under a covenant that the lessee and his assigns shall not alien without special license, if permission be once granted the condition is absolutely destroyed, and the assignee may afterwards assign or demise the whole or any part of the term without further license (1 Roll. Abr. 471; Cro. Eliz. 816; Com. Dig. Con. F.): and if the lessee has permission to alien part, he may alien the residue without another license. Cro. Eliz. 816.

An assignment occasioned by the operation of law, as under the bankrupt statutes, will supersede any private agreement between the parties; hence, a covenant by a lessee not to assign without license, will not affect the assignees of a lessee under a commission, and a *bonâ fide* alienation by them would be no breach of such a condition. 2 T. R. 136; 7 Vin. Abr. 85, pl. 9; 3 Wils. 237.

An alienation occasioned by the act of God, as an assignment by the executors or administrators of a deceased lessee, holding under such a restrictive clause, will not operate as a forfeiture. 1 Ves. jun. 295.

And where a term was taken *bonâ fide* in execution on a warrant of attorney to confess judgment, the assignment being occasioned by act of law, and not voluntary, was holden not to be a breach of the condition imposed on the lessee not to assign (8 T. R. 61): but if such an execution be permitted designedly, and in fraud of the covenant, the assignment under it will work a forfeiture. Id. 301.

the defendant should not underlet, assign, or transfer the premises, or any part thereof, without the consent of the lessor in writing, with a power of re-entry reserved to the lessor, in case the defendant should not observe the covenant in the lease. It appeared by receipts produced and parol evidence, that the defendant had underlet various parts of the premises in question to several tenants for some years; but that the lessor knew of such underlettings, all of which were previous to Michaelmas, 1775. The last receipt for rent paid by the defendant was dated March 25th, 1777, for rent due to the lessor at Michaelmas preceding. A verdict was found for the plaintiff, subject to the opinion of the court on the following questions: Whether a forfeiture was incurred by the underletting? and if it were, Whether the same was waived by or under the circumstances aforesaid? For the plaintiff it was argued, that the underletting in the case stated, being an immediate forfeiture of the lease, the subsequent possession could only be as tenant by sufferance. If so, the receipt of rent from the defendant after that time could not alone amount to a waiver of the forfeiture, any more than a subsequent receipt of rent was of itself a waiver of a notice given to quit.

a covenant not to underlet, with a power of re-entry in that event, is waived by the lessor's subsequent acceptance of rent, if he have notice of the breach.[1]

Per Cur. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture is to construe it according to the intention of the parties; upon the breach of the condition, the landlord had a right to enter; he had full notice of the breach, and did not take advantage of it, but accepted rent subsequently accrued: that showed he meant the lease should continue. Cases of forfeiture are not favoured in law, and where the forfeiture is once waived the court will not assist it.

(*b*) *Usual or Unusual.*

Morgan v. Slaughter, 1 Esp. 8.

Assumpsit to recover a penalty of 50*l*. The defendant agreed to assign to the plaintiff all his interest in the lease of a public-house, and that the lease should contain none but fair and usual covenants, and each party bound himself

Covenant not to assign is a fair and usual covenant.[2] *Sed quære?*

[1] But not where he is ignorant of the act of forfeiture at the time of such acceptance. *Roe d. Greyson, widow, v. Harrison*, 2 Term Rep. 425. And so if the condition be that the lessee will not assign, and he assign, and the lessor accept rent from the assignee, this is a waiver of the forfeiture. *Whitchcot v. Fox*, Cro. Jac. 398. But to operate as a waiver of the forfeiture it must be an acceptance of rent which has accrued since the lessor's right of entry. For upon a condition for re-entry upon non-payment of rent, the lessor may receive that rent after the day of payment, and yet enter for the condition broken. Co. Litt. 211, b. *Greene's case*, 1 Leon. 262. *Anon.* 3 Salk. 3. And so he may receive part of the rent, and enter for the non-payment of the residue. *Year Book*, 10 Hen. 7, 24, a. So if he bring an action for the rent due at the time when the forfeiture accrued, it is no waiver of his right to enter. Co. Litt. 211, b. *Pennant's case*, 3 Rep. 64. *Greene's case*, 1 Leon. 262; 3 Salk. 3. If after the forfeiture he distrained for rent previously due, he thereby affirmed the possession of the lessee, and waived his right of entry, since a landlord could not distrain for rent after the expiration of the lease. (Id.) And see *Zouch v. Willingale*, 1 H. Black. 311. But now by stat. 8 Ann. c. 14, ss. 6, 7, the lessor may distrain within six calendar months after the lessee's estate is determined. It is said, however, to have been decided that the lessor did not waive his right of re-entry, on a forfeiture incurred by non-payment of rent, by taking an insufficient distress for that rent (*Brewer d. Lord Onslow v. Eaton*, cited 6 T. R. 220); though it is not very easy to discover how the distress being sufficient or insufficient, can alter the principle upon which a distress has been held a waiver. Where a lease contained a proviso for re-entry, in case the rent should be twenty-one days in arrear, and there should be no sufficient distress upon the premises, *Lord Ellenborough, C. J.*, held, that the landlord having distrained before the expiration of the twenty-one days, but continued in possession of the distress upon the premises until after the expiration of the twenty-one days, had not thereby waived his right of re-entry. *Doe d. Taylor v. Johnson*, 1 Stark. 411.

[2] Considerable doubt appears to have been entertained as to the propriety of considering a covenant not to assign without license fair and usual. The cases are numerous and contradictory; but the question may, it is presumed, be now looked upon as settled by several recent decisions on the subject in our courts of equity (2 Platt on Leases, 238), that such a covenant is not usual. *Church v. Brown*, 15 Ves. 271, refers to all the preceding cases, and contains a most able exposition of the whole doctrine. *Lord Eldon*, in giving judgment, said: "Suppose this point altogether unprejudiced by de-

for performance in the above penalty. The lease contained a covenant not to assign or underlet without the lessor's leave. The defendant cited *Dumpor's case*, 4 Co. 119; the plaintiff, *Henderson v. Hay*, 3 Bro. C. C. 632.

Per Lord Kenyon. "This is a fair covenant, as it provides properly for the interest of the party demising; and it sufficiently appears to have been a usual one so long since as the case cited for the defendant; and I have never seen a lease properly drawn without it."—Nonsuit.

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cision. There are different sorts of landed property known to the law: land in fee-simple, and leasehold property—I am not at present alluding to copyholds. If a man covenants to sell a fee-simple estate free from all incumbrances, and says no more, it is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all times been carried into execution in a form and mode, which alter most materially, substantially and importantly, the effect of a mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants; the words operating warranties and obligations, which it was not understood between the persons contracting that the one was to undertake, and the other to have the benefit of; and accordingly it is perfectly settled by the law what are the covenants as applied to the case of a vendor, who was himself a purchaser for valuable consideration, or who took by descent, or by purchase, but not for valuable consideration; and though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties, flowing from the words, would bind the vendor and his heirs, yet it cannot be carried into execution without express covenants substituted for and limiting the implied covenants. In such a case the law would determine according to *Henderson v. Hay*, 3 Bro. C. C. 632, what are usual covenants. With regard to leasehold estates, I should lay no stress upon the word 'assigns,' if the lease was to be made to the lessee, his executors, or administrators; his assigns being included in himself, and the right to assign, unless restrained, being incident to his estate. The letter of the agreement, however, would not in any degree determine the form of the conveyance. The effect of the lease in the warranties and obligations, as arising out of the words of the lessor and lessee, 'yielding and paying,' and under the execution of their agreement by the court, is perfectly different: the latter including the covenant for quiet enjoyment; and in many other respects the mutual obligations of both, with reference to each other, being by the express covenants very materially varied. Before the case of *Henderson v. Hay*, therefore, upon an agreement to grant a lease with nothing more than proper covenants, I should have said they were to be such covenants as were just as well known in such leases, as the usual covenants under an agreement to convey an estate; and though the word 'incidental' is not very precise, I conceive Lord Thurlow's meaning to have been that the party had a right to those covenants that would be inserted in the execution of an agreement for a lease arising out of the general well-known practice as to such leases, and not contradicting the incidents of the estate belonging to a lessee, one of which is, the right to have the estate without restraint beyond what is imposed upon it by operation of law, unless there is an express contract for more. How does the history of the law with reference to this subject stand? There may be covenant for almost any thing; and this covenant against alienation without license is as old as *Dumpor's case*, 4 Co. 119; but how does the fact that there was such a covenant in that case, where it was held to be gone by alienation with license, prove that this is a usual general covenant in a lease? The conclusion is rather the other way, that this is a special and particular covenant. Consider how this grows. This covenant, which is represented to be usual, would not prevent underletting. Then, is a covenant against underletting a usual covenant, and is it proved to be so by the authorities, that it is not restrained by the other covenant? Farther, if the landlord has a covenant against both assigning and underletting, the tenant might by an agreement, neither assigning nor underletting, put another person in possession of the premises; and parting with the possession in that manner would not be a breach of those covenants. Is a farther covenant, therefore, not to part with the possession of the premises to be given as a usual covenant? That would not have restrained the tenant from parting with a part of the premises. These covenants have been always construed by courts of law with the utmost jealousy, to prevent the restraint from going beyond the express stipulation. The court will have to consider whether all these covenants are also included under the terms 'usual and proper covenants,' in the construction of an equitable agreement, where the law would regard the instrument with that jealousy. Independently, therefore, of the authorities, I should have said that the meaning of the parties to a contract for a lease was, that there should be proper covenants; and that the law implies what they are as connected with the character and title of the lessor. Covenants in this sense incidental, as regulating the obligation expressed and implied, not in contradiction to the quantity of interest which the demise itself, without special words, was by the agreement to give to the lessee." See *Blocker v. Mathers*, 5 Bro. C. C. 340. *Brown v. Rabon*, 15 Ves. 528. *Bennett v. Womack*, 7 B. & C. 627; and the subject fully discussed in Platt on Leases, vol. ii. p. 155.

(C) *To Execute Deeds as Counsel shall Advise.*

HEYWARD v. SUPPIE, 3 Mod. 191.

On covenant to make such an assignment as counsel shall advise, it is incumbent on the covenantor to procure the advice of counsel.[1]

The defendant covenanted to make such an assignment to the plaintiff, according to an agreement made between them, as counsel should direct and advise; and for non-performance this action was brought. The defendant pleaded *non est factum*, and judgment was obtained against him; upon which a writ of error was brought, and the common error assigned.

It was objected that the plaintiff's counsel should give the advice, because he was the person interested.—*Adjournatur.* *See* 1 Roll. Abr. 423; Vin. Ab. Condition (P. a); 5 Co. 23; 2 Lev. 95; 1 Vent. 255; 1 Mod. 104; 3 Keb. 232; 2 Mod. 75; Cro. Eliz. 216; Com. Dig. Condition (H.)

(D) *To Levy a Fine.*[2]

GRIGG'S CASE, 7 Mod. 293; Willes, 150.

A person covenanting to levy a fine cannot be compelled to acknowledge a fine of other lands than those comprised in the covenant; though the note's containing a few more acres only, is no ground for refusal; and a plea to the above effect is good in bar.

A. enfeoffed B. for a valuable consideration of lands in H., in the parish of M., and covenanted that he and his wife would make further assurance of the fee. The feoffee, after twenty-three years' possession, required the feoffor and his wife to acknowledge the note of a fine of his lands in the parish of M. On the feoffor's refusal this action was brought.

Per Cur. If on a covenant to levy a fine the note of the fine with which the covenantor is served contain a few more acres, it is no excuse to refuse it; but, when the note contains other lands, it is quite different; and the lands in the note in the present case are in another place than the lands in the feoffment are. There is no covenant on the wife's part, nor is she obliged to bar herself of her dower. The note does not speak of H., but of the parish of M. only.—Judgment for the defendants. *See* Fitz. N. B. 326.

(E) *To Indemnify.*[3]

NICHOLAS v. PULLIN, 1 Lev. 83. ANON. Lofft. 460.

A covenant to save a lessee harmless against all evictions, suits, and

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[1] And the party covenanting to make a conveyance as the purchaser's counsel shall advise, is bound to execute a release containing usual covenants, though not with a warranty. *Lassels v. Cutterton*, 1 Mod. 67; 1 Sid. 467; T. Ray. 190.

In action of covenant to execute such conveyance as counsel should advise, a plea that counsel advised a deed with the *usual* covenants is good without setting them out; for if the deed contain unreasonable and unusual covenants, they must be shown on the other side. *Goffe v. Elkin*, 2 Mod. 239.

There is a manifest difference between a covenant to make a conveyance at the charge of the covenantee, and a covenant to convey to the covenantee, and he covenants to be at the charge of it, for in the first case the covenantor is not obliged to perform till tender of the charges; but in the second he is to convey at his peril, and if the covenantee will not pay, he has his remedy against him upon his covenant: but where the covenant is to make a conveyance at the charge of the covenantee, the covenantor ought to give notice to the covenantee what sort of conveyance he intends to make, that the covenantee may judge what charge to tender. *Steer v. Shalecroft*, 12 Mod. 400. And if the covenant be to make a feoffment, &c., *before* such a day, the covenantor ought to give notice when he will make it, that the covenantee may be there to receive it; otherwise, if it be to make a feoffment *on a day certain;* but in that case the covenantor must plead a tender on the last convenient time of that day. Id. 401.

[2] It has been holden that the words "and it is hereby agreed that a fine shall be levied," will amount to a covenant to levy such fine. See *Hollis v. Carr*, 2 Mod. 87; S. C. Finch, C. R. 261; S. C. 2 Freem. 3; which was a suit in Chancery; and Finch, Lord Chancellor, called to his assistance Wylde and Wyndham, justices.

And such a covenant runs with the land. *King v. Jones*, 5 Taunt. 418; S. C. 1 Marsh. 107; S. C. in error, 4 M. & S. 188.

[3] Poors' rates are not included within a covenant to indemnify against all duties, charges, and taxes, to be imposed on the lands. *Case v. Stephens*, Fitzgib. 297.

A covenant to save harmless extends only to evictions upon elder title, and not to evictions by wrong. *Nicholas v. Pullin*,

expulsions, extends only to expulsions upon an elder title. See *Wotton v. Hele*, 1 Mod. 292; S. C. 2 Saund 177; and Mr. Serjeant Williams's valuable Notes, 3 T. R. 584.

HILL v. BROWNE, Freem. 142.

A general covenant to indemnify applies to tortious as well as legal acts.

A. covenants with B., his surety, in a bond to C., to indemnify him (B.) therefrom. B., in an action alleged for breach, that C. sued him in the Exchequer upon the bond, and had judgment; but he did not allege that A. did not pay the money at the day. It was urged for the defendant, that for all that appeared the money might have been paid at the day; and then, though C. did sue B. and recover, yet it was no breach of the covenant, because the suit was tortious. But on the other side it was said that there was a great difference between a general covenant to save harmless (for that should be intended only against lawful wrongs), and to save harmless against a particular person, for that was against tortious as well as rightful acts. Hob. 35. Besides, it could not be intended that the money was paid, when it was set forth that C. sued and recovered. And of this opinion was the whole court, except *Vaughan, C. J.*, and they gave judgment for the plaintiff.

(F) *To Insure.*[1]

supra in text. *Anon.* id. So a covenant by an assignee to indemnify his assignor against all covenants, &c., contained in the original lease, extends only to legal, not tortious incumbrances (*Cowper v. Pollard*, Sir Wm. Jones, 197. *Baylie v. Hughes*, id. 242); but a covenant against a *particular* person extends to tortious acts. *Perry v. Edwards*, 1 Stra. 400. *Nash v. Palmer*, 5 M. & S. 374. *Fowle v. Welsh*, 1 B. & C. 29; 2 D. & R. 133.

Thus A. and B. were bound to C. for payment of money. A. covenanted to indemnify B. The latter was sued by C., and had judgment against him. In an action by him against A., it was held that he needed not allege that A. did not pay the money at the day, for the covenant extended to a tortious action against B. by C.—*Dissentiente, Vaughan, C. J. Hill v. Browne, supra* in text.

If a landlord covenants to indemnify his tenant against land-tax, and the latter pays more than the proportion on the amount of his rent (*Yaw v. Leman*, 1 Wils. 21; 2 Stra. 1191. *Hyde v. Hill*, 3 Term Rep. 377); or, if the lessee of lands subject to a rent-charge pays the same *voluntarily* to the grantee, this is no breach of the lessor's covenant to save him harmless. *Hannam v. Redman*, 3 Salk. 109.

Covenant to indemnify against all actions, suits, claims, and demands, both at law and in equity, made or brought by A. A breach was assigned that A., who then and there made claim, entered and cut trees, and procured a tenant to attorn to him; and that the title-deeds were withheld by B. at A.'s instance:—*Held*, the acts on which the breaches were assigned were claims in law within the meaning of the covenant. But *quære* whether the breaches would have been good if demurred to? *Fowle v. Welsh*, 1 B. & C. 29; 2 D. & R. 133.

[1] At common law tenants for life were not answerable for damages done by fire, whether it arose from accident or negligence. When the Statute of Gloucester rendered tenants for life answerable for waste without any exception, it rendered them responsible for all damages done by fire. But now by the statute 6 Ann. c. 31, s. 6, it is enacted, "that no action, suit, or process whatsoever shall be had, maintained, or prosecuted, against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person, by any damage suffered or occasioned thereby, any law, usage, or custom, to the contrary notwithstanding." By the 7th sect. of this statute it is provided that nothing in this act shall defeat any contract or agreement made between landlord and tenant. In consequence of this last clause, it has been determined that where a tenant for life, under a settlement, covenanted to keep a house in good and sufficient repair, and the house was burnt down by accident, he was bound to rebuild it. *Chesterfield v. Bolton*, 2 Com. R. 626; and see *Bullock v. Dommitt*, 6 T. R. 650. If the tenant covenants to keep the premises in repair, and also to insure them in a specific sum against fire, on their being burnt down his liability on the former covenant is not limited to the amount of the sum to be insured under the latter. *Digby v. Atkinson*, 4 Camp. 275. In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessees. It appears from the case of *Monk v. Cooper*, 2 Stra. 763; S. C. 2 Ld. Raym. 1477; and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for the payment of the rent, as well as into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent, as well as rebuilding, in case the house should be destroyed by fire or tempest.

DOE D. PITT v. SHEWIN, 3 Camp. 134.

A covenant to insure and keep insured 800*l.* in some sufficient insurance office in London, is not void for uncertainty; but means where insurances against fire are usually effected.[1]

It was contended that the following covenant was void for uncertainty, as it did not specify what the nature of the insurance was to be. "And further, that she, the said defendant, her executors, &c., shall and will from time to time, and at all times during the continuance, &c., insure, and keep insured, the sum of 800*l.* at the least, in some sufficient insurance office within the cities of London and Westminster, upon the said premises hereby demised."

Sed per Cur. By reasonable intendment the insurance was to be against fire; and the lessee was bound to insure, and keep insured, the sum of 800*l.* upon the premises, in an office where policies against fire are usually effected.

(G) *In Marriage Settlements.*[2]

In *Walton v. Waterhouse*, 2 Saund. 420, covenant was brought against lessee of a house for not repairing. The defendant pleaded that the house had been destroyed by fire, but in convenient time after had been rebuilt. Plaintiff demurred specially, because defendant did not show by whom the dwelling-house was rebuilt; and judgment was given for the plaintiff.

Whether a covenant to insure be a covenant which runs with the land, is a question hitherto undecided. Supposing the lease to contain a covenant that the lessee shall insure, and in case of fire pay over the insurance-money to the lessor; there seems little doubt but such a covenant, giving double security to the lessor for the rebuilding of the house, must be taken as falling within the definition of a covenant running with the land. But, upon the bare covenant to insure, the law presents to the landlord no means of recovering from the tenant the money he may receive from the insurance office, whatever equity might do between the parties. In the Building Act, however, the officer is enjoined to pay over to the lessor the money due upon the lessee's insurance, in case the house be within the bills of mortality; so that in these districts the landlord may at once have the benefit of the tenant's insurance. A case involving this question was decided in the Queen's Bench, *Vernon v. Smith*, 5 B. & A. 1; Com. Landl. & T. 211.

[1] A. covenanted to keep insured during the term, and by the policy a space of fifteen days beyond the quarter days was allowed for payment of the premium. A. suffered the fifteen days to elapse, but insured after that period. The covenant was broken, for, during the suspension of the policy, the landlord ran the risk of fire, for which he could not recover compensation from the insurance office. *Doe d. Pitt v. Shewin*, *supra* in text. But on a covenant to insure and keep insured, if the policy provide that in case of the death of the insured the policy might be continued to his personal representative, if an indorsement to that effect were made upon it within three months after his death, it is no breach of the covenant, if the indorsement be made after the expiration of the three months, as the policy was not void, but voidable only by the company. *Doe d. Pitt v. Laming* 4 Camp. 73.

In covenant on a policy of insurance, the words *usurped power* were construed not to extend to the acts of a mere mob, who had set fire to the premises insured. *Drinkwater v. The Corporation of London Assurance*, 2 Wils. 363.

A covenant to insure is a continuing covenant, and therefore a distress, though a waiver at that time, is not a waiver of a subsequent breach of covenant to insure. *Doe d. Flower v. Peck*, 1 B. & Adol. 428.

[2] A covenant that lands limited in jointure shall for ever continue of a certain yearly value, will extend to all the estates or interests raised by that settlement, particularly if the first estate is limited to the husband (*Anon.* 1 Ld. Raym. 365); and a covenant in a marriage settlement to devise all other his (the settlor's) real estates among the issue of the marriage, embraces lands only of which the settlor may die seised: he is not, therefore, guilty of a breach of covenant in conveying away lands purchased after the settlement. *Needham v. Kirkman*, 3 B. & A. 531.

And where a father covenanted on his daughter's marriage to leave her at his death an equal share of his personalty with his son, a gift of his property in the funds to the son, reserving the annual dividends for his own life, is not a breach of the articles. *Jones & Wife v. Martin*, 3 Anstr. 882.

A. being possessed of a term, covenanted in a deed for making a family provision that if he should die during the continuance of the term of the lease, his executors should assign the residue to B. A. then purchased the reversion in fee, whereby the term became merged and died: — *Held*, that the terms of the covenant did not preclude A. from purchasing such reversion, and therefore an action on that covenant against his executors could not be maintained, the words meaning during the continuance of the estate in the term (*Williamson v. Butterfield*, 2 B. & P. 63); but if A., possessed of a term, covenants that if he die *within the number of years* then unexpired, his executor shall assign to B., he cannot, by purchasing the reversion and merging the term, exonerate his executor from the covenant. (Id.)

(H) *In Partnership Deeds.*

HARRISON v. JACKSON, 7 Term Rep. 207.

One partner cannot bind the others by deed, unless expressly authorised so to do, consequently a covenant by one for himself and the rest will not be binding on them.[1]

This was an action of covenant. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:—

The defendants were partners. The agreement stated in the declaration was produced, and the subscribing witness proved that it was executed in his presence, by the defendant Sykes, in the following form:—"For Jackson, Self, and Rushworth; W. Sykes." But neither Jackson or Rushworth was present at the execution. The question for the opinion of the court was whether such execution of the agreement by the defendant Sykes was binding on the other defendants.

Per Cur. In mercantile transactions, in drawing and accepting bills of exchange, one partner may bind the rest. But the power of binding each other by deed is now, for the first time, insisted on, except in the *nisi prius* case cited, *Mears v. Serocold;* sittings in E. T. 1785, Guildhall, *cor. Lord Mansfield, C.J.*, the facts of which are not sufficiently disclosed to enable us to judge of its propriety. Then it was said, that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but we deny that consequence just as positively as the former, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world: if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners. *Postea* to the defendants.

See Com. Dig. Attorney, C. 1; C. 5; 2 Roll. Abr. 8; R. pl. 4; 3 Bac. Abr. 408.

(I) *To Pay Money.*

(*a*) *To what Duties it extends.*[2]

(*b*) *In regard to the Period during which Payment is to be made.*[3]

(*c*) „ *Breach and Averments.*[4]

A clause that trustees shall not be liable for any other monies than what each shall actually receive, is not a covenant on their parts. *Bartlett v. Hodgson*, 1 Term Rep. 42.

[1] On a dissolution of partnership, A. and B. covenanted that B. should have a moiety of the goods in a warehouse which was to be assigned to B.:—*Held*, that B. was not bound to deliver the goods. *Stevens v. Carrington*, Dougl. 27.

If partners covenant to settle accounts yearly, and they dissolve partnership, and on a settlement the one promises to pay the other the balance found due to him, *assumpsit* will lie as well as covenant. *Foster v. Allanson*, 2 Term Rep. 479. *Moravia v. Levy*, id. 483, n. *See* Partners.

[2] On a covenant to pay all wife's debts which husband by law is liable to pay, he is not bound to discharge debts incurred for maintenance of wife's child by a former husband. *Tubb v. Harrison*, 4 Term Rep. 118.

A lessee of a coal mine, who covenanted to pay a moiety of the sum for which the coals should sell at the pit's mouth, is not liable to pay for coals sold elsewhere than at the pit's mouth, although, perhaps, equity would relieve the lessor on the ground of its being a fraud on the covenant. *Clifton v. Walmesley*, 5 Term Rep. 564. *Gerrard v. Clifton*, in error, 7 id. 676, reversing the judgment of C. P., 1 B. & P. 524.

[3] It seems that A. covenants to pay B., his son-in-law, 20*l.* annually, without saying for how long, it shall be for B.'s life (*Hookes v. Swain*, 1 Lev. 102; 1 Sid. 151); and where B., on his marriage with A., was to have the rents of her lands during their joint lives, and covenanted to pay 20*l. annually* to the use of A., this was held to extend to the joint lives of A. and B. (*Death v. Dennis*, Lutw. 8vo. ed. 163); and so a covenant to pay L. 10*l.* in lieu of his wife's dower by a former husband, is intended only for their joint lives. *Reeves v. Sheppard*, Lutw. 114.

A covenant by A., as long as he should be in receipt of the profits of a rectory, to pay B. a yearly sum during the life of the rector, is a covenant to pay while in receipt of the profits during the rector's life. *Combe v. Jones*, 2 Chit. Rep. 600.

[4] If A agrees to pay 5*l.* annually for five years, at two half-yearly payments, covenant arises on every breach (*March v. Freeman*, 3

(*d*) *In regard to the Notice.*[1]

(J) *To Pay Rates and Taxes; and herein of the Liability of Parties to Pay for the Erection and Support of Party-walls.*

THEED v. STARKIE, 8 Mod. 314.

A covenant to pay taxes on land does not include church and poor's rates.[2]

In an action of covenant brought against an executor for not paying taxes according to a covenant in a lease made by his testator, wherein he covenanted with the lessee to pay all the taxes on the lands demised, the breach assigned was for not paying the rates to the church and poor.

On demurrer to the declaration, it was objected that the breach was not well

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Lev. 383); and the action will lie on any words in a deed purporting to be an agreement for payment of money (*Brice v. Carr and others*, 1 Lev. 47; S. C. 1 Keb. 155). And on a covenant to pay B. a sum on one of two events which should first happen, B. need not aver, on bringing his action on one event, that the other had not happened, for his delay till the second contingency would not defeat his action (*Loggin v. Orrery*, 1 Ld. Raym. 133); but where the covenant is to pay a sum of money into the Exchequer, the plaintiff must allege where the Exchequer is, as it is transitory. *Tentch v. Cletheroe*, Sty. 59.

On a covenant in a charter-party to pay so much for goods delivered at A., the covenantee cannot recover *pro ratâ itineris* for goods delivered at B., although the ship was wrecked at B., and the defendant accepted the goods there. *Cook v. Jennings*, 7 Term Rep. 381.

If A. covenants to pay 100*l.* on a certain day, and B. covenants on receipt to give A. an acquittance for the same, and to enter into a bond, &c., it is at B.'s election to receive the money, and give the bond or not. *London v. Craven*, Sty. 481.

In an action on a covenant by the defendant to pay the amount of all bills drawn by him and accepted by the plaintiff, it was insisted that the plaintiffs must prove payment of such bills. But *Lord Ellenborough* said it was sufficient that the bills were drawn by the defendants upon the plaintiffs, and had come out of the hands of the latter. *Gibbon & others v. Featherstonhaugh*, 1 Stark. N. P. 225.

[1] Where A. covenants to pay 200*l.* within a year after notice for his wife's maintenance, notice need not be given in her lifetime (*Roe v. Marshall*, Skin. 34); and where J. S. covenanted, on the execution of a conveyance on a certain day, to pay the money at A. B.'s house in London, the court said that the conveyance need not be executed in London, but the covenantor ought to give notice at what time he would pay the money. *Challoner v. Davies*, 1 Ld. Raym. 400.

[2] On a covenant to pay a rent-charge, free of all taxes, on the lands or the rent, it was held that as parliamentary taxes existed prior to the grant, the covenant extended to all future parliamentary taxes, and exonerated the rent-charge (*Brewster v. Kidgil*, 5 Mod. 369; 1 Salk. 198; 2 id. 615; 3 id. 340; Comb. 424; Carth. 438; 12 Mod. 166; Holt, 175, 669); and where a lease was made, rendering rent free from all taxes and impositions, these words were construed to extend to taxes imposed by parliament (*Giles v. Hooper*, Carth. 135. *Anon.* Comb. 211. *Count of Arran v. Crisp*, 12 Mod. 54; Salk. 221; Holt, 549). But a covenant, on a demise by a bishop, for himself and successors, to pay all public taxes on the land, does not extend to a tax afterwards assessed by act of parliament (*Davenant v. Bishop of Salisbury*, 1 Vent. 223; 3 Keb. 69; 2 Lev. 68). Where, however, there is not any express agreement to the contrary, the tenant may deduct out of his rent land-tax paid by him (*Cranston v. Clarke*, Sayer, 78), in proportion to the *quantum* of rent only. *Whitfield v. Brandwood*, 2 Stark. 440.

If a tenant covenants to pay all taxes, assessments, &c., and to repair and amend party-walls, "it being the intention of the parties that the landlord should receive the yearly rent of 60*l.* in net money, without any deduction whatsoever," the lessee, and not the landlord, is bound to pay the expense of building a party-wall under the stat. 14 Geo. 3, c. 78. *Barrett v. the Duke of Bedford*, 8 Term Rep. 602.

Where notice of pulling down and rebuilding a party-wall was given under the Building Act, and the tenant of the adjoining house, who was under a covenant to repair, finding it necessary in consequence to shore up his house, and to pull down and replace the wainscot and partition of it, instead of leaving such expenses to be incurred and paid by the owner of the house, giving notice in the manner prescribed by the act, and afterwards paying the same to him on demand, employed workmen of his own to do those necessary works, and paid them for the same; the court held that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect of any works to be done being given to the owner of the house intended to be pulled down and rebuilt; and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner for such works as are authorised to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, 10 East, 227.

assigned, because those rates were personal charges, and not on the land; and, for this reason, the defendant had judgment.

See 1 Inst. 288; 3 Bulst. 354; Cowp. 453; Dougl. 411, 427.

(K) *To Pay Rent.*[1]

(L) *For Pre-Emption.*[2]

If B., a lessee, covenants to pay all the taxes except land-tax, he, and not his landlord, is bound to pay any additional land-tax arising from the improvement of the premises. *Hyde v. Hill*, 3 Term Rep. 377. *Barnfactor v. Lee*, id. 379. *Yaw v. Leman*, 1 Wils. 21; 2 Stra. 1191. So, where a lessee covenanted to pay 80*l.* a-year for rent, all taxes thereon being to him allowed, and also to pay all further or additional rates to be imposed on the premises, or any additional buildings or improvements; and the lessors covenanted to pay all rates in respect of the 80*l.* rent, except such further or additional taxes as might be charged on the premises; it was held that the tenant was bound to discharge any increase of the rate on the old rent as well as any new rates. *Graham v. Wade*, 16 East, 29. *Watson v. Atkins*, 3 B. & A. 647.

Covenants to pay land-tax and sewers' rates are usual covenants. *Bennett v. Womack*, 7 B. & C. 627; 1 M. & Ry. 644.

Under a covenant by lessor to pay all taxes, if the premises be improved with his consent, and thereby further taxes be charged, he is only to pay in proportion to the rent. *Watson v. Home*, 7 B. & C. 285; 1 M. & Ry. 191.

[1] Where the tenant covenants to pay rent, he is not absolved by premises being destroyed or inundated. Sty. 47; Al. 26. With respect to those cases where a rent service shall be apportioned by the act of God, it is said that if part of the land be demised, or surrounded, or covered by the sea, this will make an apportionment of the rent; for though the soil remains to the lessee, yet by ordinary intendment there is not any probability of regaining it. It is otherwise if land demised be burnt by wild-fire, because the use of the land is not thereby taken away, and the land may again be restored to its former fertility by the care and industry of the tenant. Roll. Abr. 236.

Or burned down, and the landlord be bound to rebuild, and neglect to do so, yet the rent must be paid during the term. *Monk v. Cooper*, 2 Ld. Raym. 1477; Stra. 763. *Belfour v. Weston*, 1 Term Rep. 310. Neither will a court of equity in such case interfere to restrain an action under the contract for payment of rent. *Hare v. Grove*, 3 Anstr. 617. *Holtzapffel v. Baker*, 18 Ves. 115.

And if the covenant be to pay rent half-yearly, from Michaelmas, 1661, to Michaelmas, 1668, the last day of the latter half year is inclusive (*Pigot v. Bridge*, 1 Vent. 292); and a covenant to pay rent at Christmas and Midsummer, or within fourteen days after, the first payment to be made on Christmas Day, is not broken by non-payment on that day (*Anon.* 2 Show. 77). So, a covenant to pay rent contained in a lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is binding for rent accrued within the first seven years, as the lease is valid at least for that period. *Ferguson v. Cornish*, 2 Burr. 1032. And if a lease be made for seven, fourteen, or twenty-one years, the lessee only has the option of determining it at the end of the first seven years, every doubtful grant being construed in favour of the grantee. *Doe d. Webb v. Dixon*, 9 East, 15.

If A. covenants to pay his lessor 10*l.* a-year more rent in case another piece of land should be adjudged to the plaintiff, or the defendant should enjoy the same by any ways or means, A. is liable to pay the additional rent, although he derives a lease of the piece of land from another person (*Heath v. Baker*, Ca. Temp. Hardw. 319); and if a tenant under a lease made by a jointress pays rent to the remainder-man with her knowledge, under a supposition that her estate was forfeited by her second marriage, which afterwards proved to be void, he is liable on his covenant to repay the same to her executor after her decease. *Williams v. Bartholomew*, 1 B. & P. 326.

A lessee covenanted to pay rent, and not to assign without leave, provided, if the rent be in arrear, or the covenants on the lessee's part *hereinafter* contained be broken, the lessor might re-enter, and there were no covenants by the lessee after the proviso:—*Held*, that the lessor could not re-enter on an assignment, as the court could not reject the word *hereinafter*, the intention of the parties not being clear. *Doe d. Spencer v. Goodwin*, 4 M. & S. 265.

An action of covenant lies for rent, although the lessor re-entered. *Hartshorne v. Watson*, 6 Dowl. P. C. 404; 4 Bing. N. S. 178. But, if the premises be let for a purpose contrary to the Building Act, the rent cannot be recovered. *Gas-Light & Coke Co. v. Turner*, 9 Bing. N. S. 666; 7 Scott, 778; affirmed on error, 6 Bing. N. S. 324.

The executor of the assignee of an insolvent debtor is liable for rent, under 7 Geo. 4, if the assignee acted as tenant. *Abercrombie v. Hickman*, 3 Nev. & P. 676.

[2] A. demised to B. parcel of some freehold hereditaments, and covenanted that if he (A.), his heirs or assigns, should have an offer to sell an adjoining parcel, he would not dispose of the same without previously offering it to B. at 5*l.* per cent lower. A.

(M) *To Renew.*[1]

sold the entire property, including the adjoining parcel, as one entire contract, at one entire consideration, without giving the covenantee the right of pre-emption:—*Held*, this was no breach of covenant. *Collison v. Lettsom*, 6 Taunt. 224; S. C. 2 Marsh. 1.

[1] A covenant to procure a renewal "to the utmost in the covenantor's power," compels him to pay a fine. *Simpson v. Clayton*, 4 Bing. N. S. 758; 6 Scott, 469.

Upon a covenant in a lease for three lives, upon the death of any or either of the life or lives, to renew upon "notice within one year next after the death of any or either of the said person or persons, for whose life or lives such premises were then held," and neglect for five years after the death of the first life, but a proper notice and request on the dropping of a second life, and bill filed to declare plaintiff entitled to a perpetual renewal on the ground of ignorance and accident:—*Held*, that the requisition made on the expiration of the second life clearly did not confer a right to have the first renewed; but the court retained the bill for twelve months, with liberty to bring an action at law; if none brought within that period, bill dismissed without costs. *Maxwell v. Wind*, M'Clel. 458.

A covenant to renew under the same rent and covenants has been held a covenant for perpetual renewal, where there had been many previous successive renewals of the lease, each containing the same covenant, the court holding that the parties had by their own acts construed this to be a covenant for a perpetual renewal. *Sed quære?* (*Cooke v. Booth*, Cowp. 819.) But a covenant in a lease for twenty-one years to renew upon request at the end of eighteen years for the like term of twenty-one years, at the same yearly rent and fine, *with all covenants, grants, and articles, as in that indenture contained*, was held not to extend to a perpetual renewal, although *various* other leases had before been made by the owners, containing a corresponding covenant to renew, for *non constat* from this averment (even if it were admissible to construe the meaning of the indenture), that *all* the former leases contained the same covenant. *Iggulden v. May*, 7 East, 237; 3 Smith, 269; 2 B. & P. 449, where the judgment of K. B. was affirmed.

A. covenanted in a lease for sixty-one years, at any time within one year after the expiration of twenty years of the term of sixty-one years upon the lessee's request, to renew for the further term of twenty years, to commence after the expiration of the sixty-one years, and so in like manner at the end of every twenty years. The court held that, as the lessee had neglected to claim a renewal at the end of the first twenty years, he could not claim a further term at the end of the last twenty years. *Rubery v. Jervoise*, 1 Term Rep. 229.

Where A. covenanted to use his *endeavours* to renew certain leasehold premises, determinable on three lives, when any of the lives should drop, and on one of the lives falling he renewed for his own, this was construed not to be a breach. *Scudamore v. Stratton*, 1 B. & P. 455.

A lessee of renewable leaseholds underlet part to A., who covenanted to pay to the lessee on every renewal such fines, &c. as he should pay in respect of the underlet premises. A renewal was made exceeding the interest of the under-lessee by five years, and it was held that he was liable only to a payment commensurate with his interest in the premises. *Charlton v. Driver*, 5 J. B. Moore, 59; 2 B. & B. 345.

A covenant for perpetual renewal entered into by a person having a limited interest in lands, does not bind the estate, and, therefore, if his assignee require the inheritance, it is not bound by the covenant. *Brereton v. Twohey*, 8 Ir. Ch. Rep. 190.

Where a lease contains a covenant by a landlord for renewal, the courts of equity will in general decree a specific performance of such covenant: thus, a covenant to renew at the request of the lessee, within the term, will be enforced even in favour of the executor of the lessee, who died before any request made. *Hyde v. Skinner*, 2 P. Wms. 196. Nor is it any objection to its execution that it is a covenant for perpetual renewal. *Lord Thurlow*, indeed, on more than one occasion expressed his disapprobation of such covenants, and inclined to consider them contracts of such a nature as a court of equity ought not to execute. But the contrary is now clearly settled, and a court of equity will in all cases execute an express covenant for perpetual renewal, where such a covenant is clear and unequivocal. *Rees v. Lord Dacre*, cited 9 Ves. 332. *Tritton v. Foote*, 2 Bro. C. C. 636; and see *Hyde v. Skinner*, *supra*. *Somerville v. Chapman*, 1 Bro. C. C. 16; *Russel v. Darwin*, 2 id. 639, n. *Iggulden v. May*, 9 Ves. 325; S. C. 7 East, 327; 2 N. R. 449; and see *Bridges v. Hitchcock*, 5 Bro. P. C. 6, and *Furnival v. Crewe*, 3 Atk. 83. *Betesworth v. Dean, &c. of St. Paul's*, 2 Eq. Ca. Abr. 26.

Where, however, the tenant is insolvent, it should seem that a court of equity will not decree a renewal. The point, indeed, has never been expressly decided; but in a case where an injunction had been granted against an ejectment by the landlord, upon the ground that there had been a covenant to renew, the Lord Chancellor dissolved the injunction upon its appearing that the tenant had paid a composition of 7*s.* in the pound to his creditors, and among them to the landlord for a debt due for goods sold. *Buckland v. Hall*, 8 Ves. 92. *Vide Brook v. Hewitt*, 3 id. 253. *Boardman v. Mostyn*, 6 id. 467. *De Minckwitz v. Udney*, 16 id. 466. And *query*, whether the court would consider a covenant for re-entry a sufficient protection to the landlord against the probable in-

(N) *To Repair*[1] *and Rebuild.*

(*a*) *To what Buildings it extends.*[2]

solvency of the tenant. *Vide Hyde v. Skinner, supra.* It is quite clear, however, that where the lessee has become bankrupt, his assignees cannot derive any benefit from a covenant for renewal entered into before the bankruptcy (*Drake v. the Mayor of Exon*, 1 Ch. Ca. 71. *Vandenanker v. Desbrough*, 2 Vern. 97. *Moyses v. Little*, id. 194; and see *Weatherall v. Geering*, 12 Ves. 504; and *Skerne's case*, Moore, 27); and it is equally clear that the court will not enforce a covenant for renewal where the tenant has been convicted of felony (*Willingham v. Joyce*, 3 Ves. 168); nor in cases where the agreement to renew has been accompanied by fraud or misrepresentation (Id. *Pendred v. Griffith*, 1 Bro. P. C. 314. *Davis v. Oliver*, 1 Ridg. P. C. 9); or when the tenant has already been guilty of a breach of a covenant agreed upon to be inserted in the new lease. *Hill v. Barclay*, 18 Ves. 63; but see *Williams v. Chency*, 3 Ves. 59; and *Weatherall v. Geering*, 12 id. 511; and *Featherstonhaugh v. Fenwick*, 17 id. 298, 313. *Gourlay v. the Duke of Somerset*, 1 Ves. & B. 68.

In general, where there has been any laches or neglect on the part of the tenant in not applying for a renewal in due time, a court of equity will not assist him, unless he satisfactorily account for the delay (*Allen v. Hilton*, 1 Fonbl. on Equity, 432. *Baynham v. Guy's Hospital*, 3 Ves. 295. *Eaton v. Lyon*, id. 690. *City of London v. Mitford*, 14 id. 41; and see *Earl of Ross v. Worsop*, 1 Bro. P. C. 281); as where the lessee for lives, with a covenant to renew on the expiration of one life, omits to apply for a renewal until two drop. *Bayly v. Corporation of Leominster*, 1 Ves. jun. 476; and *see* Com. L. and T. 479, 482; 1 Madd. Ch. Pr. 398.

[1] In general, the repairs of the demised premises form the subject of an express covenant. The covenant to yield them up in repair at the end of the term is sometimes distinct, but more frequently associated with the covenant to repair. 2 Platt on Leases, 182. Independently of contract, a tenant from year to year must keep the premises wind and water-tight (5 C. & P. 239; 7 id. 327), and make fair and tenantable repairs (4 T. R. 318; 18 Ves. 331), as by putting fences in order (4 T. R. 318), or replacing windows or doors that are broken during his occupation (2 Esp. 590); but he is not liable for the mere wear and tear of the premises (6 C. & P. 8, 12); nor answerable if they are burnt down; nor bound to rebuild if they become ruinous by any other accident (Holt, N. P. C. 7; 1 Marsh. 567); nor to replace doors and sashes worn out by time (5 C. & P. 239), to put on a new roof, or make similar substantial and lasting repairs (7 id. 327), or what are called general repairs. 1 Marsh. 567. An express contract to repair supersedes implied obligations of the like nature. *Standen v. Christmas*, 10 Q. B. 135.

A covenant to repair runs with the land, and binds an assignee of the demised premises, although not mentioned in the covenant by name (*Spencer's case*, 5 Co. 16 a; 2 Platt on Leases, 184), for it affects the estate of the term, and of the reversion in the hands of the owner for the time being.

[2] A covenanted to build three houses and keep them in repair, and having built four, the covenant was held to extend to the additional house, which fell to decay. *Dowse v. Cale*, 2 Vent. 126; 3 Lev. 264. So, where a lessee covenanted to repair and keep in repair all buildings and improvements, and yield up, &c., he could not remove a verandah built by him, the lower part of which was affixed to the ground by means of posts. ——— *Administratrix of Penry v. Brown*, 2 Stark. 403. And where by a deed reciting that the defendants had appropriated and laid out certain meadows as building ground, the defendants demised a piece of the land to plaintiff, who covenanted to build thereon two houses, and the defendants covenanted "that, on such buildings being covered in, they would cut good and sufficient roads in, through, and over the meadows, and construct a good and sufficient sewer under the intended roads, for the common use of the plaintiff and all other lessees or tenants of the other portion of the meadows." The plaintiff also covenanted to pay from a certain fixed period a sum per annum as his proportion towards the repair of the roads to be laid down: — *Held*, that the defendant's covenant was not satisfied by their making a road up to the plaintiff's houses, but that as soon as those houses were covered in the defendants were bound to make good and sufficient roads over the whole meadows, as contemplated by the building scheme, although no other houses than the plaintiff's had been built. *Mason v. Cole*, 4 Ex. 375; 18 L. J. Ex. 478.

In like manner racks are included in a covenant to repair stables, nor need it be shown by the declaration that they were fixed to the freehold (*Anon.* 2 Vent. 214); and a covenant to repair *prædimissa* will extend to a malt-house subsequently built by the lessee. *Brown v. Blunden*, Skin. 121.

A covenant "forthwith" to put premises into complete repair must receive a reasonable construction, and is not to be limited to any specific time, and, therefore, it will be for the jury to say upon the evidence whether the defendant has done what he reasonably ought in the performance of it. *Doe d. Pittman v. Sutton*, 9 C. & P. 706.

But a covenant in a lease to erect and rebuild certain messuages, and to repair and leave in repair the said demised premises, and all such other houses, &c., was held to extend to the new erections only. *Lant v. Norris*, 1 Burr. 287.

Under a covenant for a lessor to be en-

(*b*) *Liability of Covenantor, though the Premises be Destroyed by Fire, &c.*[1]

titled to "view," refusing to show particular rooms is not a breach, unless convenient notice has been given. *Doe d. Wetherell v. Bond*, 6 C. & P. 195. But, under the word, "upheld, &c.," removing a wall, partly a garden, and taking up trees ten feet high, is a breach of covenant. (Id.) Under a covenant "substantially to repair, uphold," &c., held, that the lessee was liable to keep up the inside painting. *Monk v. Moyes*, 1 C. & P. 265. Upon a covenant to repair premises which, at the time of the demise, are old: — *Held*, that it was for the jury to say whether the lessee has done what was reasonably to be expected, looking to the age of the premises and covenants entered into; and that he was not bound at the end of the term to restore the buildings in a renewed form, or of greater value, but only to take care that they did not suffer more than the operations of time and nature would effect. *Gutteridge v. Maynard*, 2 M. & Rob. 334.

And the general state of the premises at the commencement of the term may be questioned and considered by the jury. *Burdett v. Wilthers*, 2 Nev. & P. 122. *Mantz v. Goring*, 4 Bing. N. S. 451; 6 Scott, 277.

If there be a general covenant to repair, and another to repair within three months, a notice under the latter is a waiver of the former. *Doe v. Meux*, 4 B. & C. 606; 7 D. & R. 98.

Enlarging windows and opening external doors is not a breach of a covenant to repair. *Doe d. Dalton v. Jones*, 1 Nev. & M. 6; 4 B. & Adol. 126.

A lessee who has erected fixtures for the purpose of trade upon the demised premises, and afterwards takes a new lease, to commence at the expiration of his former one, which new lease contains a covenant to repair, will be bound to repair those fixtures, unless strong circumstances exist to show that they were not intended to pass under the general words of the second demise; but it seems doubtful whether any circumstances, dehors the deed, can be alleged to show that they were not intended to pass. *Thresher v. the Company of Proprietors of the East London Waterworks*, 3 B. & C. 608; S. C. 4 D. & R. 62.

[1] Under a general covenant to repair, a lessee is bound to rebuild, if the premises be destroyed by fire. *Bullock v. Dommit*, 6 Term Rep. 650; 2 Chit. Rep. 608. *Compton v. Allen*, Sty. 162. *Poole v. Archer*, 2 Show. 401; Skin. 210. *Chesterfield v. Bolton*, 2 Com. 626. In case the premises were accidentally consumed by fire, the tenant would at common law have been guilty of waste if he neglected to rebuild them. Co. Litt. 53, b. But by the statute 6 Anne, c. 31, ss. 6, 7 (made perpetual by 10 Anne, c. 14), it is enacted, "that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted, against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby; provided that this do not extend to defeat or make void any contract or agreement made between landlord and tenant." So that at present the tenant cannot by mere force of legal obligation, without some special covenant or agreement, be called upon to rebuild the premises, which may be burned down during his occupation. See *Chesterfield v. Bolton*, Com. Rep. 629.

And where the covenant is to build a bridge, and repair it for seven years, the party is liable to rebuild the bridge, though broken down by a flood (*The Brecknock and Abergavenny Canal Navigation v. Pritchard*, 6 Term Rep. 750); and if, after the expiration of a written lease, the tenant holds over by verbal agreement, and pays an increased rent, he is presumed to hold under the covenants of the former lease, and if the premises be destroyed by fire he is bound to rebuild them. *Digby v. Atkinson*, 4 Camp. 275.

If a lessee covenants to repair, casualties by fire and tempest excepted, it seems doubtful whether the lessor is bound, in either of these excepted cases, to repair. *Weigall v. Waters*, 6 Term Rep. 488. *See* 28 L. J. Q. B. 48.

In the case of *Monk v. Cooper*, Stra. 763; S. C. 2 Ld. Raym. 1477; it does not appear that there was any express covenant by the landlord to rebuild in case of fire; though it seems to have been taken for granted that he was bound to do so, because the lessee's covenant to repair contained an exception against fire; and that he would not be liable appears to have been expressly decided in the Court of Chancery. *Steele v. Wright, cor. Lord Apsley*, cited 1 T. R. 708. On another occasion, where the doctrine of the lessee's liability, notwithstanding the destruction of the house, was alluded to, *Lord Kenyon* observed, "that it must be taken with some qualification, for where an action was brought for rent, after the house was burnt down, and the tenant applied to the Court of Chancery for an injunction, *Lord Northington* said, that if the tenant would give up his lease he should not be bound to pay the rent. *Cutter v. Powell*, 6 T. R. 323. In more than one case in Chancery, where the lessee has covenanted to repair (accidents by fire excepted), and the house having been burnt, the lessor being insured, and having received the insurance money, has neglected to rebuild, an injunction has been granted against an action at law by the lessor for the rent till the house should be rebuilt. *Camden v. Morton*, 2 Eden, 219; S. C. Selw. N. P. 436, 4th ed. *Brown v. Quilter*, 2 Eden, 219; S. C. Amb. 619. *Steele v. Wright, supra.* But these cases have been overruled by *Hare v. Groves*, Anstr. 687; and *Holtzapffell v. Baker*, 18 Ves. 115. *See* the note in Mr. Eden's valuable edition of Lord Northington's *Decisions*, vol. ii. p. 219. As to relief against forfeiture for not insuring, *see* 23 & 24 Vic. c. 126, s. 2.

(*c*) *What a Satisfaction of.*

EVELYN v. RADDISH, 1 J. B. Moore, 411.

If A. covenants in a lease to repair, and within the first fifty years of the term to take down the four messuages demised, *as occasion might require*, and erect four new ones in their place, the covenant will be satisfied by the lessee's making the original houses substantially as good as new, without taking down the old houses.[1]

The lessee of four messuages for ninety-nine years covenanted, within the first two years of the term, to put the premises in good and sufficient repair, and at all times during the remainder of the term to repair, uphold, &c. as need or occasion should be or require, and so to yield up at the end of the term; and, further, within the first fifty years of the term, to take down the four messuages as occasion might require, and in the place thereof erect in a workmanlike manner not less than four other good and substantial brick messuages, in the same uniform way and manner as the other messuages in the same street, &c.: —*Breach*, that although fifty years of the term had expired, the defendant had not taken down the four old and erected the four new houses.

Per Cur. The only awkwardness lies in the words "as occasion shall require;" for thereon it must be shown that occasion did arise. The lessor is clearly entitled to have four houses as good as new, before or at the end of fifty years, but the question is, in what form is he to have them? the lessee might have pulled down the houses and rebuilt them within two years, and that would have satisfied both covenants, and the lessor would have had at the end of the term four houses with ninety-seven years' wear on them. We are of opinion, if the plaintiff has the original houses as good as new in the course of the fifty years, he has all he is entitled to, and that the covenant is thereby satisfied.

(*d*) *What a Breach.*

DOE D. VICKERY v. JACKSON, 2 Stark. 293.

It is a breach of a covenant to repair to break a door-way through the wall of the house demised into the adjoining house, and to keep it open for a long space of time.

Ejectment on a forfeiture for a breach of covenant to repair and keep in repair. The defendant had broken a door-way through the wall of the demised house, into the adjoining house.

Per Cur. This is a continuing breach, and a want of repair which amounts to a forfeiture.

(*e*) *At what time and against whom Action lies; and herein of Notice.*

LUXMORE v. ROBSON, 1 B. & A. 584.

On a covenant to repair and keep in repair during the term, an action for breach may be maintained before the determination of the lease.[2]

The breach assigned was upon a covenant that the lessee should well and sufficiently repair, and keep in proper repair, all and singular the buildings thereon standing, or thereafter to be erected upon the premises during the continuance of the term. In support of a general demurrer it was said, that the covenant to keep in repair would be satisfied by the lessee's putting the premises into repair, at any time during the continuance of the term; and that no right of action vested in the lessor or his assignees before the term had expired; and *Main's case*, 5 Coke, 21, and F. N. B. 145, k, and 12 E. 3, Covenant 2, were cited.

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[1] A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and, therefore, it will be for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it. *Doe d. Pittman v. Sutton*, 9 Car. & P. 706: *Denman*.

[2] And where the lease contains a covenant to repair generally, and also another covenant that it shall be lawful for the lessor to enter and leave notice of wants of repair, and the lessee covenants to repair within six months accordingly, these covenants are distinct, and an action may be brought for a breach, without giving six months' notice (*Wood v. Day*, 7 Taunt. 646; 1 J. B. Moore, 389); or within the six months, although a notice to repair forthwith be served (*Roe d. Goatly v. Paine*, 2 Camp. 520). But where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of

Sed per Cur. By the terms of the covenant to keep the premises in repair, the lessee must have them in repair at all times during the term, and if they are at any time out of repair he is guilty of a breach of covenant; and neither common sense nor any principle of law will lead to the conclusion, which the passage cited from 5 Rep. would seem to warrant. — Judgment for the plaintiff. *See* 2 Roll. Rep. 347.

Bacheloure v. Gage, Sir Wm. Jones, 223; Cro. Car. 188.

Per Cur. Upon a covenant in deed an action always lies against the first lessee; but if it be to repair, the lessor has his election, after assignment and acceptance of rent from the assignee, whether he will sue the first lessee or the assignee, but if it were a collateral covenant, the action lies only against the lessee.

(O) *To stand Seised.*[1]

(*a*) *How Created.*[2]

re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe d. Morecraft v. Meux & others*, 4 B. & C. 606.

And on an agreement to keep a thing in repair, the party must take notice when repairs are wanting, nor need the other side give notice of their being required. *Schomberg v. Nash*, Say. 113.

On a covenant to repair, the lessor may sue the lessee or the assignee of the premises; or the assignee of part only of the premises. *Conan v. Kemise*, Sir Wm. Jones, 245. *Twynam v. Pickard*, 2 B. & Ald. 105. The right of action against the original lessee is not discharged by the lessor's acceptance of rent from the assignee, there being an express covenant by deed. If, however, there be a covenant arising from implication of law, the case will be otherwise. *Bacheloure v. Gage*, *supra* in text.

[1] This kind of conveyance derives its effect from the Statute of Uses, 27 Hen. 8, c. 10, and operates without transmutation of possession. Formerly, if a person had covenanted and agreed for himself and his heirs, that, for a certain consideration, another should have his lands, though the lands did not pass for want of livery, yet the use passed to the covenantee. Now, whenever a covenant of this kind is entered into, if the consideration be sufficient, a use arises out of the seisin of the covenantor, which is immediately executed by the statute, in the *cestui que use*, who thereby acquires the legal estate. *See* Plowd. 301, 303; 4 Cru. Dig. 115; 2 Sand. on Uses, 4 ed. 79, *et seq.* Smith, P. & R. p. 661, 2d ed.

In order to render a covenant to stand seised effectual, the covenantor should have a vested estate in possession, reversion, or remainder. Therefore, a covenant to stand seised of land, which the covenantor shall afterwards purchase, is void. Moore, 342; Cro. Eliz. 401; 2 Roll. Abr. 790, pl. 8. It is said, that if a joint-tenant covenant to stand seised of the moiety of his companion after his death, it is void, although the covenantor survive. 2 Roll. Abr. 790, pl. 9; 2 Sand. on Uses, 4 ed. pp. 83, 84.

[2] A feoffment and letter of attorney, without livery and name of attorney, may operate as a covenant to stand seised (*Walker v. Hall*, 2 Lev. 213); so where A., in consideration of an intended marriage with B., gave, granted, released, and enfeoffed certain lands to B. and C. to the use of B. for life, in lieu of dower, with remainders over, it was held this deed should operate as a covenant to stand seised, and that A.'s son was entitled (*Doe d. Milburn v. Salkeld*, Willes, 673); and a covenant to stand seised may arise on deeds of lease and release, using the words "grant, release, and confirm," although a valuable consideration be also expressed in the deed (*Roe d. Wilkinson v. Tranmer*, 2 Wils. 75; S. C. Willes, 682): but where A. covenanted to levy a fine to the use of his son, and that he (A.) was seised in fee, and so should be till the use vested in the son, and no fine was levied, this did not operate as a covenant to stand seised. *Hule v. Cockerill*, 3 Lev. 126.

A deed, however, cannot enure as a covenant to stand seised, where the intention of the conveying party appears to be contrary to such construction. *Daw v. Newborough*, 1 Com. 241. The words *dedit et concessit* (*Baker v. Lade*, 3 Salk. 306), or *give and grant* (*Coltman v. Senhouse*, 2 Lev. 225; S. C. 2 Show. 13); or *give and grant, bargain and sell, alien, enfeoff, and confirm*, will raise an use, and operate as a covenant to stand seised. *Scudamore v. Crossing*, 1 Mod. 175, 176; 2 Lev. 9. In a covenant of this description, the word *covenant* is but *declaratory*; therefore, if the father by deed sets forth that he stands seised to the use of his son, and doth not covenant to stand seised, yet it is a good covenant (*see* 4 Salk. 385; 1 Vent. 140; 2 Roll. 787; 3 Mod. 237; Ray. 46; 2 Ves. 252; 2 Wils. 22, 75); or, if the father covenants to stand seised to the use of the son, and to do any act for further assu-

(*b*) *Action upon, and how Pleaded.*[1]
(P) *To Surrender Copyholds.*[2]
(Q) *For Title.*[3] *See* vol. i. p. 63.

rance, or to levy a fine to the use of the son in tail, and that, if not levied before such a time, that then he will stand seised to his use, this shall enure as a covenant to stand seised. 3 Salk. 385; 3 Lev. 306. If the word "covenant" were *obligatory*, the deed would not enure as a covenant to stand seised; therefore, if the father covenants that his land shall go, remain, and descend to his son, after his decease, or that he will convey to his son, this is not a covenant to stand seised, for it is only obligatory to a future thing. *Vide* 3 Salk. 385; 2 Roll. 788; 1 Sid. 3; 2 Lev. 77, 226.

If A. gives, grants, and enfeoffs two strangers to the use of himself for life, with remainder to his son, and no livery or attornment made, this cannot enure as a covenant to stand seised, being a covenant with strangers, and therefore wanting the necessary consideration. *Hore v. Dix*, 1 Sid. 25.

Where A. covenanted to stand seised to the use of A. and B., and C. *his brother* (*i. e.* of the covenantor) this was held good as to the brother, and the estate was entirely in him; but the covenant was void as to the other two, because they were not privy to the consideration. *See* 3 Salk. 384; 1 Cro. 530; Plowd. 307; T. Jon. 419; 2 Roll. 783.

The consideration in a covenant to stand seised must be either lawful blood or marriage. The consideration of blood extends to a parent or a legitimate child, kinsman, or kinswoman; the consideration of marriage extends to a marriage had or intended with the covenantor or any of his blood. 3 Jarm. & Byth. by Sweet, 671–673; Co. Litt. 123 a, n. 8; 4 Cruise 32, c. 10, ss. 12, 15, 18; Watk. Conv. 3d. edit. by Prest. 199.

A covenant to stand seised is good, although the use is not to arise until after the decease of the survivor of the covenantor and his wife. *Doe d. Dyke v. Whittingham*, 4 Taunt. 20.

A general power to lease contained in it is void. *Chute v.* ——, 1 Lev. 30; 3 Salk. 384.

This kind of covenant makes no alteration in an estate tail, but conveys a base fee defeasible by the entry of the issue in tail (*Machel v. Clerk*, 11 Mod. 19; 2 Salk. 619; 2 Ld. Raym. 778.

[1] It is said an action will not lie on such a covenant. *Pybus v. Mitford*, Freem. 351; 1 Vent. 372; 2 Lev. 75; T. Raym. 228.

A grant to operate as a covenant to stand seised, must be so pleaded. *Lade v. Baker*, 2 Vent. 145, 260, 266; S. C. *nom. Baker v. Lane*, Skin. 315; Holt, 211.

[2] A surrender to two copyholders in pursuance of a covenant to surrender generally is good (*Beany v. Turner*, 1 Lev. 293; 1 Mod. 61; 2 Keb. 666); and where A. covenants to surrender copyholds, the custom being that he may surrender in court, or by attorney, it is no breach to refuse to execute a letter of attorney for that purpose, as A. has his election. *Symmes v. Smith*, Sir Wm. Jones, 314.

A purchaser may be put to considerable difficulty in accepting a surrender by attorney. The letter of attorney may be lost, yet he will be obliged to prove it, as also its execution. It may be true, that a court of law would make strong presumptions in such a case; but why should the purchaser be put to the inconvenience of resting his title on a casualty? A letter of attorney may be clandestinely revoked immediately after it is made; or the revocation may be notified to the attorney without the purchaser's knowledge: in either case, a conveyance under such circumstances would be void, and the purchaser left to his remedy by suit in equity. *Mitchell v. Neale*, 2 Ves. 680.

In a recent case, the *Vice-Chancellor* observed, that although at law a surrender by power of attorney cannot be questioned, yet, as it in truth imposes a greater difficulty of proof of title upon the purchaser, and may expose him to a question, whether the power of attorney had not been revoked, a court of equity, where the vendor comes for its aid in a sale, will compel the vendor, if it can conveniently be done, to make the surrender in person. *Noel v. Weston*, 6 Madd. 50: Watk. Cop. by Cov. 73.

A. covenanted to do all acts at *his own costs* for assuring copyholds. Non-payment of the fine for covenantee's admission is no breach: for the title is complete before the fine becomes due. *Graham v. Sime*, 1 East, 631.

[3] Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor, and his real and personal representatives. *Middlemore v. Goodale*, 1 Roll. Abr. 521 (K), pl. 6; Cro. Car. 503, 505; Sir Wm. Jones, 406. *Campbell v. Lewis*, 3 B. & A. 392. And as the covenants relate to the land, it seems that an assignee may maintain an action on the covenants, although they were entered into with the original grantee and his heirs only (Co. Litt. 384, b; 385, a. *Spencer's case*, 5 Rep. 16. *Bally v. Wells*, 3 Wils. 25. *Tatem v. Chaplin*, 2 H. Black. 133); and the right of action even for a breach in the ancestor's lifetime will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor (*Kingdon v. Nottle*, 1 M. & S. 355. *King v Jones*, 5 Taunt. 418; 1 Marsh. 107; 4 M. & S. 188. So covenant will lie by the devisee of lands in fee, though broken in the testator's lifetime, for the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title, there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all; but is in the nature of a covenant to do a thing *toties quoties*, as the

(*a*) *Seisin.*

Butterfield v. Marshall, 1 Lutw. 8vo. ed. p. 232.

A conveyance of a messuage, with egress to a tenement, does not amount to a covenant, though the covenantor is seised of the latter.

By indenture the defendant's father bargained and sold to the plaintiff a messuage, &c. and also ingress, &c. from the gate-house to the well adjoining, to draw water for his necessary occasions; and covenanted that he was seised in fee of the messuage and premises, and that the purchaser should enjoy, free from all incumbrances. To debt on bond for performance of covenants, the defendant pleaded performance generally. The plaintiff replied, and assigned for breach, that the defendant was not seised in fee of the well; the defendant demurred.

Per Cur. The breach is not well assigned, for it is that the defendant was not seised in fee of the well, when, in truth, there was not any covenant that he was so seised in fee: it was only that the plaintiff should have liberty to draw water there; and by the plaintiff's own showing he has no cause of action.

(*b*) *Good Right.*[1]

(*c*) *Quiet Enjoyment.*[2]

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exigency of the case may require. *Kingdon v. Nottle*, 4 M. & S. 53; Sugd. *Vend. & Purch.* 541, 6th ed.

A. sold some building land to B., and he covenanted for title. After some houses had been built on the land the purchaser was evicted:—*Held*, that the purchaser was entitled to recover upon the covenants not only the value of the land, but also that of the houses subsequently built thereon. *Bunny v. Hopkinson*, 27 Beav. 565.

The covenants usually entered into by a vendor seised in fee are—1st, that he is seised in fee; 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs, and assigns; 4thly, that the estate is free from incumbrances; and, lastly, for further assurance.

Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor seised in fee. In small purchases, the first covenant is sometimes omitted, which may be safely done; for the first and second are synonymous covenants. (Id. 451.)

A general covenant by B. that he is seised in fee, and has good right to convey, does not extend to the wrongful act of strangers. *Jerrit v. Weare*, 3 Price, 575.

A. conveyed a messuage to the plaintiff, and free ingress, &c. to a well, and covenanted that he was seised; this covenant was held not to extend to the well. *Butterfield v. Marshall*, *supra* in text.

[1] If A. and wife are seised in right of his wife, and A. covenants that they have good right to convey, the fact of the wife being under age at the time is a breach (*Nash v. Aston*, T. Jones, 195; Skin. 42); and an action may be maintained on a covenant for title, although the sale has previously become void by the non-payment of the purchase-money on the day mentioned in the deed. *Raynolls v. Woolmer*, Freem. 41.

[2] A covenant for quiet enjoyment during the term is implied by law from a demise by parol, but not a covenant for good title. *Bandy v. Cartwright*, 8 Ex. 913; 22 L. J. Ex. 285. The implied covenant for title and quiet enjoyment arising on the word *demise* (*Line v. Stephenson*, 4 Bing. N. C. 678. *Burnett v. Lynch*, 5 B. C. 589) has yielded in practice to the express covenant for quiet enjoyment, which, by its power of limiting the liability intended to be assumed by the lessor, and guaranteeing the enjoyment of the estate during the whole term granted to the lessee, presents readier means than the former of effecting the intention of the parties; for it is well established, in accordance with the maxim, *expressum facit tacitum cessare*, that the general implication of title in a lease for years, though not in a lease for life, is restrained by the particular express covenant. 2 Platt on Leases, 285. *See* 16 L. J. 445; 12 Mee. & W. 68.

The late acts of 7 & 8 Vic. c. 76, ss. 6 & 13, and 8 & 9 Vic. c. 106, s. 4, which deprived the word *grant* of its operation as a covenant in law in deeds executed after the 31st of December, 1844, except so far as it might by force of any act of parliament imply a covenant, left untouched the effect of the word *demise*. The word *demise* does not create a warranty. Shep. Touch. 184.

A covenant in lease for quiet enjoyment of a new intended road, whenever the same may be made, cannot apply to a road not made at the time the parties contracted, but finished before the execution of the lease. *Crisp v. Price*, 5 Taunt. 548. And where A., being tenant for life, with a leasing power of certain lands, granted a lease thereof to B., which lease was afterwards held void by a court of law, upon the ground that it was not made in accordance with the leasing power. The lease contained in it a clause, that "A. for himself, his heirs and assigns, the said demised premises, with the appurtenances, unto the said B., his executors, administrators and assigns, under the rent, covenants, conditions, exceptions, and agree-

ments before expressed, against all persons whomsoever lawfully doing the same, will during the said term warrant and defend." Upon the death of A. the remainder-man brought ejectment against B., and recovered judgment and possession of the demised premises. In an action by B. against the executors of A. for a breach of the said covenant:—*Held*, that the words "warrant and defend" operated not as a covenant in law only, but as an express covenant for quiet enjoyment, extending to the term purported to be granted by the lease, and, therefore, that the executors of A. were liable for a breach thereof. *Williams v. Burrell*, 1 C. B. 402; 14 L. J. (N. S.) C. P. 98; 9 Jur. 282.

If A. covenants to discharge the purchaser of land from all rents, a quit-rent is included. *Hammond v. Hill*, 1 Com. 181. Thus, a covenant for quiet enjoyment, and that the estate was free from all incumbrances, made by the defendant, or those claiming by, from, through, or with his or their acts, means, *default*, &c., was held broken by a quit-rent being in arrear, although it was not alleged that it became due during the defendant's seisin of the premises. *Howes v. Brushfield*, 3 East, 491. In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the court would apply as well to a mortgage, as any other incumbrance created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default. The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorised by prior decisions. Sugd. *Vend. & Purch.* 552, 6th ed.

A general covenant for quiet enjoyment against all men, extends not to tortious entries. *Hayes v. Bickerstaffe*, Vaugh. 118. *Lucy v. Levington*, Freem. 103; 2 Lev. 26. *Semb. contra Anon.* Sty. 67. Such a covenant, therefore was held not to be broken by the States of America during the rebellion seizing the property conveyed, although their independence was subsequently acknowledged by this country (*Dudley v. Folliott*, 3 T. R. 584); and a collateral warranty given by a stranger extends only to titles precedent. *Rashleigh v. Williams*, 2 Vent. 59, 61; 3 Lev. 325; *nom. Buckly v. Williams.*

If, however, a lessor covenants for quiet enjoyment against the *lawful* interruption of himself, &c. his entry is a breach of this covenant, although tortious. *Crosse v. Young*, 2 Show. 425. *Cave v. Brookesby*, Sir Wm. Jones, 360.

A. demised to B. with a covenant that the premises should not be used for trade. B. underlet to C. without notice of this provision, and with a covenant for quiet enjoyment against all interruption through his acts, *means*, &c. C., in ignorance of the clause, underlet to D., who exercised a trade on the premises, and was ejected by A. It was held that this was not an eviction by the *means* of B. within the meaning of the covenant, as the ejection was produced, not by the proceedings of B. but by those of D. *Spencer v. Marriott*, 1 B. & C. 457; 2 D. & R. 664. See *Evans v. Vaughan*, 4 B. & C. 261.

A covenant for quiet enjoyment against a particular person (*Lucy v. Leviston*, Freem. 103), or against all persons claiming, or pretending to claim any right in them, extends to all interruption, illegal as well as legal (*Chaplain v. Southgate*, 10 Mod. 383; 1 Com. 230): so, if a lessee under a power of leasing, badly executed, be evicted by a remainder-man taking under a joint appointment by the lessor and his wife, the executors of the lessor are liable to an action on their testator's covenant for quiet enjoyment against all persons claiming by, from, through, or under him. *Hurd v. Fletcher*, Dougl. 43. But a covenant in a demise, excepting a part of the premises to E. K., is not an express covenant against the acts of E. K., whether claiming by title or not (*Rashleigh v. Williams*, 2 Vent. 59, 61); and a covenant against eviction extends to an eviction after the date, but before the delivery of the deed, for the lease takes its effect in computation from the date. *Lewis v. Hillard*, 1 Sid. 374; 2 Keb. 291, 377. Where, however, it is against a particular person on a sale of goods, no notice is necessary. *Dod v. Jenkinson*, Skin. 160.

If A. grants a dependent office with a covenant for quiet enjoyment as long as A. holds the superior office, and covenants not to revoke or annul the grant, a surrender of the superior office is no breach (*Steping v. Gladding*, Freem. 18); nor is a bill for an injunction to stay waste, on a covenant for quiet enjoyment, although dismissed with costs. *Morgan v. Hunt*, 2 Vent. 213.

And where A. covenanted for B.'s quiet enjoyment of an annuity, and that he would not molest, hinder, or disturb him in the peaceable enjoyment, and to do all reasonable acts for further assurance, a breach was assigned that, although requested to do a reasonable act, that is to say, that he should direct the trustees (of a term for securing an annuity) to raise and pay the arrears thereof, and A. refused, &c.; this breach was held badly assigned, the refusal to direct not being an act of molestation. *Warn v. Bickford*, 9 Price, 43.

On a demise, however, of a house and garden, building on the garden (*Kidder v. West*, 3 Lev. 167), or the erection of a gate across a lane leading to the plaintiff's close, although the defendant had a right to do so (*Andrews v. Paradise*, 8 Mod. 318); or a prior subsisting lease, by which a second lessee is prevented taking possession, is a breach of a covenant for quiet enjoyment. *Ludwell v. Newman*, 6 T. R. 458.

(*d*) *Free from Incumbrances.*[1]

(*e*) *Further Assurance.*[2]

(R) *Not to carry on certain Trades.*[3]

A grant to J. S. and assigns, occupiers of a house abutting on a piece of land twenty feet wide, of a right of way over that piece, and all liberties and powers incident or needful to the enjoyment, &c., authorises the grantee to put down a flag-stone in front of the house, and an action lies against the grantor on his covenant for quiet enjoyment for removing it. *Gerrard v. Cooke*, 2 N. R. 109.

An action is maintainable for a breach of covenant for quiet enjoyment of a way of necessity. *Morris v. Edginton*, 3 Taunt. 24.

And if A. sells goods, and warrants them, against all persons, covenant may be maintained if the vendor had neither property nor possession, without showing eviction. *Hacket v. Glover*, 10 Mod. 142.

A copyholder demised her copyhold for one year, at the end thereof for thirteen years more, if the lord would grant a license, and covenanted for quiet enjoyment during the term aforesaid. A. B. having bought the premises, and evicted the lessee before the expiration of the fourteen years, it was held that an action would not lie on the covenant for quiet enjoyment. *Luffkin v. Nunn*, 1 N. R. 163; *see* this case, 4 East, 221. Also in 11 Ves. 170, where it was held, that the license was a condition precedent, and not being granted, there was no lease at law further than from year to year; and there was no equity, upon the circumstance that the lord purchased his tenant's interest with notice of the demise, and an express exception of all subsisting leases, or agreements for leases.

On the sale of an office, the defendant agreed that the plaintiff should receive the profits for life, and to an action of covenant the defendant's plea in bar that he had suffered the plaintiff to enjoy, &c., was held good, for there was no personal engagement to pay. *Sawyer v. Killigrew*, 4 Mod. 39. *Killigrew v. Sawyer*, 2 Vent. 79; Carth. 196.

Where, however, A., claiming under a fine, covenanted for quiet enjoyment, on eviction it was held that the defendant could not plead a subsequent act of parliament, vacating the fine under which he claimed. *Lucy v. Levington*, 1 Vent. 175; 2 Lev. 26.

[1] A. covenanted that a lease assigned by him was not incumbered. B. and C. entered, of whose estates the assignor had had notice, and one had attorned to him: this was held to be a breach. *Levett v. Withrington*, Nels. Lutw. 97. *See* 6 T. R. 458.

[2] A covenant by a mortgagor for absolute further assurance shall not compel him to release his equity of redemption. *Atkin v. Urton*, Comb. 318; 1 Ld. Raym. 36.

A vendor who has sold a bad title will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration. *Taylor v. Debar*, 1 Ch. Ca. 274; 2 id. 212. See *Seabourne v. Powell*, 2 Vern. 11. It seems that, under a covenant for further assurance, a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the estate. *Napper v. Lord Allington*, 1 Eq. Ca. Abr. 166, pl. 4. So if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery. *Pye v. Daubery*, 3 Bro. C. C. 595. But if the original contract was not fit to be executed by equity, the court will not interfere in behalf of the purchaser, but leave him to his remedy at law. *Johnson v. Nott*, 1 Vern. 271. And if the title prove bad, and the purchase was made at a great undervalue, equity will relieve the vendor against an action on the covenant for title, allowing the purchaser his purchase-money, with interest only, he discounting the mesne profits. *Zouch v. Sevaine*, 1 Vern. 320; Sugd. *Vend. & Purch.* 564, 6th ed.

A fine may be required, though not named. *King v. Jones*, 5 Taunt. 418; S. C. 1 Marsh. 107; in error, 4 M. & S. 188.

If A. covenants with B. to make an assurance specified in the covenant, at the costs of B., B. ought to tender the costs before he can demand the assurance. If the assurance be general, A. ought to give notice of the nature of the assurance to be made, and after tender of the costs by B. make the assurance. *Heron v. Treyne*, 2 Ld. Raym. 750.

It was decided that a covenant by A. for himself and wife (an infant) to make further assurance if requested within seven years, was not broken if the wife died above twenty-one, and within the seven years, and that the plaintiff should have made the request. *Nash v. Aston*, T. Jon. 195; Skin. 42.

[3] A covenant not to carry on, or suffer to be carried on, any trade or business on the demised premises is broken by an assignment to one who opens a school there (*Doe d. Bish v. Keeling*, 1 M. & S. 95). So a covenant not to carry on the trade of a butcher is broken by the sale of raw meat on the premises, although the animals are not slaughtered there (*Doe d. Gaskell v. Spry*, 1 B. & A. 617); though where lessee covenanted not to carry on certain trades (that of a licensed victualler not being mentioned), or any other business that might be, grow, or lead to the damage, annoyance,

(S) *To Transfer Stock.*[1]

(T) *To yield up at the end of the Term.*[2]

4th. What shall be deemed a Performance of some Special Covenants.[3]

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or disturbance of the neighbourhood, the opening of a public-house was held not to constitute a breach of the covenant. *Jones v. Thorne*, 1 B. & C. 715; 3 D. & R. 152.

Conveyance in fee, with a restriction by way of use against carrying on certain trades on the property, held binding. *Hodson v. Coppard*, 29 Beav. 4. A., upon property being conveyed to him, engaged with B. that a certain trade should not be carried on upon it. A.'s tenant carried on such trade. Upon a bill by B. against A. alone, for an injunction, he insisted on his right to carry on the trade. The court granted a perpetual injunction against A., his servants and agents, but declined extending it to his tenants. (Id.)

A covenant not to carry on trade to and from certain places is legal (*Archer v. Marsh*, 6 Ad. & E. 959; 2 Nev. & P. 562); and means the nearest mode of access. *Leigh v. Hind*, 9 B. & C. 774.

And a covenant not to seek for orders in certain towns, except at certain times, is not void as in restraint of trade. *Homer v. Ashford*, 3 Bing. 322. So, keeping a lunatic asylum is not a trade or business within a covenant. *Doe d. Wetherell v. Bird*, 4 Nev. & M. 285; 2 Ad. & E. 161; 6 Car. & P. 195.

A covenant to take beer of the lessor, "or their successors in their said trade," is not binding, if the successor remove from those premises. *Doe d. Calvert v. Reid*, 10 B. & C. 849.

A covenant not to carry on the trade of a common brewer or retailer without license applies to a sub-lessee. *Simons v. Farren*, 1 Bing. N. S. 126. But, a covenant for the exclusive privilege of supplying beer to certain houses is not the subject of a demise. *Hinde v. Gray*, 1 Scott, N. S. 123. And a covenant to do the best to keep a public-house open, if the license be refused, is satisfied by an application for another license. *Linder v Pryor*, 8 Car. & P. 518.

[1] On a covenant to transfer stock on such a day at the East India House, provided A. should demand the same by word or writing, A. need not wait till the last hour of the day, but a demand at any time during the day is sufficient; nor need a demand *ore tenus* be made to the very person of the covenantor. *Hall v. Cupper*, Carth. 268.

And if A. covenants to transfer stock in three days after demand, he has any of the three days for that purpose. *Jeffry v. Wood*, 11 Mod. 351. *See post*, Stock.

[2] A covenant by a lessee to yield up at the end of the term all erections and buildings then erected, or thereafter to be erected, includes buildings subsequently erected for the purposes of trade, if they be let into the soil, but not if they rest on blocks or pattens (*Naylor v. Collinge*, 1 Taunt. 19); consequently, buildings erected for the purposes of trade, such as Dutch sheds, may be removed. *Dean v. Allalley*, 3 Esp. 11. *See post*, Fixtures.

A covenant to deliver up at the end of the term all the trees standing in the orchard, whole and undefaced, reasonable use and wear only excepted, is not broken by removing trees decayed and past bearing, and substituting others in a different part of the ground, the orchard being overcrowded. *Doe d. Jones & Ux. v. Crouch*, 2 Camp. 448.

And where a lessee covenants that it shall be lawful for the lessor, if desirous of taking all or any part of the premises demised for building, to enter without interruption by the defendant, on giving six months' notice, and there is a proviso for avoiding the lease on non-performance of covenants, the refusal of the lessee to give up the premises after notice is a breach of his covenant, and a consequent determination of his lease. *Doe d. Wilson v. Abel*, 2 M. & S. 541.

Under a covenant to leave all fixtures and "improvements," the word "improvements" comprehends millstones. *Martyr v. Madley*, 9 Bing. 26.

So, under a covenant to deliver up buildings, &c., then standing or to be erected as salt-works, includes newly erected salt-pans set up and parcel of the brick-work. *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 427; 8 Scott, 820.

[3] An agreement to load on shipboard goods which are *cumbersome* is well performed by bringing them to the quay, and offering to send them on board. *Stone v. Gilliam*, 1 Show. 149.

A covenant by B. to procure a lease to be granted to A., is not performed by B.'s procuring the grant to himself, and offering to assign it to A. *Scudamore v. Stratton*, 1 B. & P. 455.

A voluntary deed and covenant by a testator, that his executors should invest certain monies in the name of a corporation for charitable purposes, is not defeated by showing no corporate powers exist for such purpose. *Tufnel v. Constable, Executors, &c.* 3 Nev. & P. 47.

A covenantor assenting to a breach he could not prevent, does not thereby commit a breach. *Hobson v. Middleton*, 6 B. & C. 295.

A continuance of a breach of covenant is not waived by receipt of rent. *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376. And the

(U) *Covenant not to Sue.*[1]

III. Of Covenants in regard to the Parties and their Representatives, and their relative Rights and Liabilities; and herein of Covenants running with the Land.

1st. In regard to the Persons capable or incapable of Contracting, and the Causes of their Incapacity.

Jones v. Morley, Carth. 410; 4 Mod. 261; 2 Salk. 677; 1 Ld. Raym. 287; Show. Parl. Cas. 140; *nom.* Jones v. Mosely, Com. 29, 47. Mudge v. Mudge, 1 Com. 332.

All persons having legal capacity may covenant.[2]

All persons having legal capacity may enter into a covenant or agreement; but husband and wife, being by law considered as one person, cannot with effect covenant with one another.

demand of rent to waive a forfeiture must be made by a person authorised to waive the forfeiture. *Doe d. Nash v. Birch*, 1 Mee. & W. 402.

An assignee by assigning does not discharge himself from breach of covenants running with the land, incurred in his time. *Harley v. King*, 2 C., M. & R. 18.

[1] The suspension of a right to bring a personal action once existing is extinguished and discharged for ever. Plowd. 36, 84; 2 Dy. 140; 1 B. & P. 630; 6 Bing. 726. *Ford v. Beech*, 17 L. J. Q. B. 114; *see* 18 id. 147; 19 id. 34; 23 L. T. 81. A covenant not to sue must be general, and amount to a release, otherwise it is no bar, and only confers a remedy by cross-action. 1 T. R. 441; Cro. Eliz. 352; 3 Mee. & W. 210; 4 Ir. Jur. 104. As to the effect of a proviso that no action shall be brought for a named period, *see* 28 L. J. Ex. 100. *See post*, Release.

To a declaration for goods bargained and sold, the defendant pleaded that the cause of action accrued to the plaintiff against the defendant and A., B., and C., jointly, and not otherwise, and that the defendant was not separately liable, and that the plaintiffs by deed released A., B., and C., from the cause of action. *Replication*, that the deed was a deed of assignment from A., B., and C., of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release, as in plea pleaded; but that, in another and earlier part of the same deed, it was agreed as follows:—"That it shall be lawful for the creditors to execute these presents without any prejudice to any mortgage, lien, or security which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who may be liable for the payment thereof." That all the creditors who executed the deed, executed without prejudice as aforesaid:—*Held*, on demurrer to the replication, that, construing the deed as pleaded in the plea with the justification introduced by the replication, it amounted only to a covenant not to sue, and not to a release, and that the liability of the defendant was reserved, whether it was originally joint only, or joint and several. *Willis v. De Castro*, 27 L. J. Ex. 243.

[2] Covenant by A. and B., lessors, against lessee, on an indenture of lease, which, on oyer, appeared to be made between D. (since deceased), therein described as master; and A., B., and two other persons, since deceased, therein named and described as governors of a certain hospital, and the defendant. The demise was by the "said master and governors," and the covenants to and by the lessors were respectively to and for the said "master and governors, and their successors." "In witness whereof the said master and governors have hereunto affixed their common seal." One seal was affixed as the common seal of the lessors, none of whom signed the indenture, and the execution by the defendant was under his hand and seal. The declaration stated, that defendant entered under the demise and enjoyed during the whole term (ten years). *Breach*, non-repair at the expiration of the term, but that defendant was entitled to judgment, because it appeared by the record that the demise was by a corporation, and the court could not judicially notice the fact that no such corporation existed. *Cooch v. Goodman*, 2 Ad. & E. (N. S.) 580.

A declaration in covenant by A., B., and C. stated, that by indenture they demised certain premises to the defendant for a term; and the defendant covenanted to yield up the premises in good repair at the end of the term. *Breach*, that at the end of the term he yielded up the premises out of repair. The defendant on oyer set out the indenture, which appeared to be made between A., the master, and B. and C., the governors of an hospital of the one part, and the defendant of the other part. It stated that the "master and governors" had demised the premises to the defendant, and that the covenant in question was made with the said "master and governors, and their successors;" and it also contained covenants by the said "master and governors for themselves and their successors," and concluded thus: "In witness whereof the

2d. Of the Rights of the Parties.

(A) *Who may Sue.*

(*a*) *At Common Law.*

1st. *Covenantee.*[1]

2d. *Heir.*[2]

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said master and governors have hereunto affixed their common seal." A seal, purporting to be a common seal, was affixed on the part of the lessors, and the deed purported to have been signed, sealed, and delivered by the defendant. The defendant then pleaded that the indenture was not signed by the plaintiffs, or their agent, lawfully authorised by writing; and that there was no demise of the premises signed by them or their agent, lawfully authorised by writing. *Special demurrer* to the plea, on the ground that it was an argumentative denial of the plaintiffs' right of action, and of the validity of the indenture of demise: — *Held*, that it appeared by the record that the lease was made by a corporation, and that no action could be maintained upon it in the names of the plaintiffs. *Cooch v. Goodman*, 2 Gale & D. 159; 6 Jur. 779.

That though the names of the members of the corporation were mentioned in the indenture, those persons, as individuals, could not be considered as parties to it, because, independently of the form of the covenants and the concluding clause, "*in cujus rei testimonium*," the seal professed to be the seal, not of individuals, but of a corporation. (Id.)

Semble, that if the plaintiffs, as individuals, had appeared to be parties to the indenture, the want of execution by them would have been no answer to the action. (Id.)

[1] Lessor may maintain an action against the lessee on his covenant for payment of rent, notwithstanding an acceptance of the assignee as his tenant, but he cannot bring an action of debt. *Thursby v. Plant*, 1 Saund. 237; 1 Lev. 259; 1 Sid. 401.

Immediately upon an assignment the lessor acquires a right against the assignee, by reason of the privity of estate, and may enforce against him all the covenants in law and in deed, which run with the land (3 T. R. 393); and the lessor may at the same time sue the lessee upon his express covenant, and the assignee in respect of the privity of estate: but then he will be permitted to take out execution against one only. *Brett v. Cumberland*, Cro. Jac. 523.

And where rent is reserved on a demise by tenant for life and remainder-man, in part to the one and part to the other, they may sue separately on the implied covenant arising from the words "yielding and paying." *Baker v. Beresford*, 2 Sid. 1, 9; T. Raym. 58. So, tenants in common may sue, for a breach of covenant to repair, the lessee of a house, who subsequently to the lease, and before the breach, became a co-tenant of the plaintiffs in the premises. *Gates v. Cole*, 5 J. B. Moore, 554; 2 B. & B. 660.

If a rent-charge is granted to A. to the use of B., although *cestui que use* may distrain by virtue of the Statute of Uses, 27 Hen. 8, c. 10, yet he cannot maintain an action of covenant, but the covenant is not discharged as to the grantee to uses, and he may bring an action thereupon. *Bascawin v. Cook*, 1 Mod. 223; 2 id. 138.

No action will lie on a covenant by C. to pay a sum of money to A., B., and himself, C., or the survivors or survivor of them, on their joint account. *Faulkner v. Lowe*, 2 Ex. 595.

[2] A covenant relating to the land, and being for the advantage of the reversion, runs with the land, and the heir may bring an action. *Sale v. Kitchingham*, *post* in text. If the lessee's estate be a mere chattel interest, the term will vest upon his death in his executor or administrator, who may take advantage of any breach of covenant incurred after the lessee's death. But if the heir be entitled to the lessee's interest (as in the case of the death of tenant *pur autre vie*, living *cestui que vie*), the heir alone can take advantage of the covenants running with the land, though the executor will still be entitled to sue for breach of collateral covenants. Thus, an action lies for him, though not named, on a covenant by a lessee for repairs (*Lougher v. Williams*, 2 Lev. 92); or on a demise by his ancestor rendering rent to him, his executors, administrators, and assigns, *during the term* (*Sacheverel v. Frogate*, 1 Vent. 148, 161; 2 Saund. 367; T. Raym. 213; 2 Lev. 13); or on a covenant by a vendor, that he and his wife would do all acts for further assurance; and he may assign as a breach that the vendor, although requested by the purchaser in his lifetime, refused to levy a fine with his wife, *per quod* the devisee of the wife, after the death of the purchaser, ejected his heir: nor is a request by the heir necessary to entitle him to maintain the action. *King v. Jones*, 5 Taunt. 418; S. C. 1 Marsh. 107; S. C. in error, 4 M. & S. 188. The heir of the grantee of a rent-charge, however, cannot maintain covenant against the assignee of the grantor, but he may have a remedy in equity against him (*Brewster v. Kidgil*, *supra*, 489); and to entitle himself to bring covenant as heir to his father, he must show that his father had some estate. *Willet v.* ——, Holt, 568.

SALE v. KITCHINGHAM, 10 Mod. 158.

This action was brought by the plaintiff, as heir-at-law to the lessor, upon a covenant that the lessee should lime and dung the land *durante termino*, which was six years; and the breach assigned was that, after the descent of the land, he did not *durante termino* lime and dung the land. It was objected by the defendant, that covenant being a personal action, the executors were the proper persons to bring it, though, upon recovery, they would be trustees for the heir-at-law. When heir ought to sue at law.

Per Cur. This is a covenant relating to the land, and for the advantage of the reversion; it would have gone to an assignee without his being named in the covenant, which proves it to be a covenant that runs with the land, and attends upon the reversion, and by consequence, a covenant to which the heir-at-law is entitled, as he is to the reversion. *See* Shep. Touch. 175; Dyer, 338.

BREWSTER v. KIDGIL, 5 Mod. 369; 1 Salk. 198; 2 id. 615; 3 id. 340; Comb. 424; Carth. 438.

Per Cur. The heir of the grantee of a rent-charge in fee cannot maintain an action of covenant against the assignee or lessee of the grantor, but only against the grantor and his heirs, because the covenant does not run with the land; neither is it annexed to the thing granted, but it is a personal covenant, by which the heir may be charged in respect of assets descended, but not otherwise. He might have remedy *in equity* against the assignee, but not *at law*, for that would be to make the covenant of as high a nature as a *warrantia chartæ*. When remedy only in equity.

3d. *Executor or Administrator.*[1]

4th. *Assignee.*

LEWIS v. CAMPBELL, 3 J. B. Moore, 35; S. C. 8 Taunt. 715; 3 B. & A. 392.

J. B. demised to Campbell a messuage, &c., for twenty-one years, at a yearly rent of 70*l.*, who assigned to Corp part of the demised premises with a covenant for quiet enjoyment, which premises Corp assigned over to the plaintiff, and he brought this action against Campbell for a breach of the covenant for quiet enjoyment, alleging that J. B., by reason of a forfeiture before then committed The assignee of an assignee of a term may maintain covenant on the privity of

[1] Executor is the proper person to bring an action for a breach of covenant in his testator's lifetime, although the heirs and assigns only were named. *Lucy v. Levington*, 1 Vent. 175; 2 Keb. 831; 2 Lev. 26. Where, therefore, A. having granted to B. a lease for years, covenanted that at the end of the term he would make a lease to B. and his assigns for twenty-one years, to commence from the expiration of the first term; and B. dying during the first term, A. upon its expiration refused to grant a further lease. It was adjudged that an action was maintainable upon the covenant by the executor of B. *Chapman v. Dalton*, Plowd. 284, a. Or for a breach of a covenant to repair. *Morley v. Polhill*, 2 Vent. 56. The same action also lies for an administrator *de bonis non* for breach in his intestate's lifetime (*Smith v. Simonds*, Comb. 64); but an executor of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years granted by the lessor, though the breach was committed after the lessor's death. *Mackay v. Mackreth*, 2 Chit. Rep. 461. But the executor of an administrator of a term shall sue for rent against a lessee on a lease granted by such administrator, in preference to the administrator *de bonis non* of the intestate. *Drew v. Bayly*, 2 Lev. 100; S. C. 3 Keb. 298; 1 Vent. 275. Where, however, a mortgage is made to be in fee, and the mortgagor covenants that he is seised in fee, and has good right to convey, an action cannot be supported by B.'s executor on the covenant, without showing some special damage arising from the breach of the covenant in the lifetime of the testator. *Kingdon v. Nottle*, 1 M. & S. 355. Nor where the covenant is for further assurance, can B.'s executrix maintain an action for breach, without showing that she had, or claimed an interest in the premises, as assignee or otherwise of the testator. *Kingdon v. Nottle, supra. Chamberlain v. Williamson*, 2 M. & S. 408.

If A. B. covenants to serve C. D. for eight years, he is liable to serve his executor, if he employs him in the same trade. *Jackson v. Bridge*, 12 Mod. 650.

estate against the assignor for a breach of a covenant for quiet enjoyment, as the covenant runs with the land.[1]

by the defendant for a breach of covenant contained in the lease to him, evicted the plaintiff in an action of ejectment. For the defendant it was argued that there was no privity of contract between the parties, nor of estate, either by the common law or by the stat. 32 Hen. 8, c. 34, so as to entitle an assignee to an action in his own name, the defendant having no reversion left in him; and that if any action were maintainable it ought to have been brought in the name of Corp, with whom the covenant was entered into, it being a rule of law that a chose in action could not be assigned so as to entitle the assignee to an action in his own name.

Per Cur. A distinction may be drawn between those covenants which are collateral with, and those which are inherent in the land; but this was a covenant expressly entered into by the defendant with Corp and his assigns for quiet enjoyment of the land. It is a covenant, therefore, which cannot be said not to run with the land. As, therefore, this is a covenant which runs with the land, there is a privity of contract if that were necessary; but at all events, if that were not so, there is a privity of estate. In cases of an assignment of the inheritance, it is quite clear that the covenant runs with the land; but a distinction has been attempted to be drawn as to a term for years: but, neither on principle nor authority, has that distinction been supported.

(*b*) *Under the stat.* 32 *Hen.* 8, *c.* 34.[2]

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[1] The assignee, however, will only have a right to take advantage of a breach of covenant in his own time; and, therefore, covenant does not in general lie by the assignee for a breach committed before the assignment, unless such breach be still continued. Com. Dig. Covenant, B. 3. And so may the devisee of a purchaser in fee against the vendor for a breach of covenant that he was lawfully seised in fee, and had a good right to convey, &c., although broken in the lifetime of the testator, for it is a continuing breach in the lifetime of the devisee. *Kingdon v. Nottle*, 4 M. & S. 53. The law is the same in respect to an assignee who derives possession by the effect of legal process, as by him to whom a lease for years is sold by force of an execution. Cro. Eliz. 553. And as a covenant in a lease to supply the two messuages demised, with water at so much per annum, runs with the land, the assignee may, for a breach, maintain covenant against the lessor. *Jourdain v. Wilson*, 4 B. & A. 266.

When the breach is before the assignee's own time, he cannot support an action. *Canham v. Rust*, 8 Taunt. 227; 2 J. B. Moore, 164. See *Harley v. King*, 2 C., M. & R. 18.

The plaintiff's devisor, being seised of certain premises and a mill in fee, demised a close, *reddendum* certain rents, and doing suit to the lessor's mill by grinding there all the corn grown on the demised premises. It was held that as this was a covenant running with the land, the service partaking of the nature of a rent, the devisee might, as long as the reversion of the land demised and the mill continued in the same person, maintain covenant against the lessee for not grinding corn at the mill. *Vyvyan v. Arthur*, 1 B. & C. 410; 2 D. & R. 670.

Mortgagor and mortgagee of leasehold premises made an underlease, in which the lessee covenanted with the mortgagor and his assigns to pay rent and to repair, the assignee (of the mortgagee) to whom an absolute conveyance of the reversion in fee was afterwards made, could not maintain an action for breach, as the covenants were only collateral to the grantor's interest (*Webb v. Russell*, 3 Term Rep. 393), yet it was held that the mortgagor himself might maintain the action against the lessee, the covenant being *in gross*. *Stokes v. Russell*, id. 678; 1 H. Black. 562.

[2] At common law no person was competent to support an action of covenant, or take advantage of any covenant or condition, except such as were parties or privies to the deed; and therefore a grantee or assignee were entirely precluded from deriving any benefit from the provisions contained in the lease. To remedy so manifest an evil, the stat. 32 Hen. 8, c. 34, gives the assignee of a reversion the same advantages against the lessee or his assignee, or their personal representatives, upon covenants annexed to the land, as the lessor, or his heir, or their successor had, by entry for non-payment of rent, or for the commission of waste, or other forfeiture; and the same remedies by action for not performing other conditions and covenants contained in a lease, as the lessor or grantor had themselves respectively.

Of this statute it is to be remarked, that it does not extend to covenants upon an estate in fee or in tail, but only upon leases made for life, or term of years; and the grantee cannot avail himself of a condition before he has given notice to the lessee, but he may of a covenant.

The grantee or assignee can only take advantage of such conditions as are incident to, and for the benefit of the reversion, as for non-payment of rent, waste, repairs, &c., but not for the payment of a sum in

BARKER v. DAMER, 3 Mod. 337; 1 Salk. 80; 1 Show. 191; Carth. 182. BEELY v. PARRY, 3 Lev. 154. THURSBY v. PLANT, 1 Saund. 237. THRALE v. CORNWALL, 1 Wils. 165.

W. B. made a lease to one P., who covenanted for himself, his executors, administrators, and assigns, to pay the rent reserved to the lessor, his heirs and assigns. W. B. conveyed his reversion to the plaintiff, and the term became vested in the defendant; and in an action of covenant for non-payment, the question arose whether the assignee of a reversion could bring covenant against the assignee of the lessee in any other place than where the land was.

The grantee of the reversion may bring covenant for rent against the lessee, or his assignee, by virtue of the 32 Hen. 8, c. 34, by which statute it appears that privity of contract between the lessor and lessee was transferred on a grant of the reversion.[1]

Per Cur. The statute 32 Hen. 8, c. 34, did not transfer any privity of contract to the assignee, but the intent of it was to annex to the reversion such covenants only which concerned the land itself, as to repair the house and amend the fences, and not to annex or transfer any collateral covenants, as to pay a sum of money, for that is fixed by the common law to the reversion. There is this difference between debt and covenant: the first is an action at common law, which hath fixed the rent to the reversion, and therefore such an action must be maintained upon the privity of estate, which is always local; but an assignee of a reversion could not bring covenant at common law, for that was given by the above statute.

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gross, as the delivery of corn, wood, and the like.

The surrenderee of a copyhold reversion may bring debt or covenant against the lessee who are within the equity of this act, for it is a remedial law, and such a construction could not prejudice lords of copyhold manors.

The assignee of a lessor may maintain covenant against the lessee after the lessee has assigned, and he may have accepted rent from the assignee; and an assignor of a reversion who hath accepted rent from the assignee of the lessee may support covenant against the personal representatives of the lessee, for a breach of covenant running with the land, though it be committed after the assignment of the reversion.

[1] The books reporting the above case of *Barker v. Damer* disagree on the question whether privity of contract was or was not transferred by the statute of 32 Hen. 8. It is asserted in 3 Mod. 338, that the court held that such privity was not transferred; but on referring to the case in 1 Show. 199, it would appear that *Holt, C. J.*, said: "The naming or not naming the assignees will not alter the case, for the assignee is bound only at common law. It is true that the privity of contract between grantor of reversion and the lessee is assigned to the grantee by the statute of Hen. 8, but the assignee of the lessee remains as he was at common law;" and with this exposition of the opinion of the court agrees the report in Carth., where it is said, p. 183: "*Nota:* it was agreed by all that the grantee of a reversion may maintain an action of covenant against the lessee himself, as well in in the county where the demise was made as in the county where the lands lie, because the privity of contract between the lessor and the lessee is transferred to the grantee of the reversion by the statute of Hen. 8. See *Thursby v. Plant*, 1 Saund. 240. *Webb v. Russell*, 3 T. R. 401.

Assignee of the reversion of part of the premises only may sustain an action. *Twynam v. Pickard*, 2 B. & A. 105. And the statute extends to copyholds. *Glover v. Cope*, 4 Mod. 80; 3 Lev. 326; 1 Show. 284; Carth. 205; Holt, 159; 1 Salk. 185; Skin. 296, 305; Comb. 185. The action may likewise be supported by an assignee of the reversion, although assignees are not named. *Kitchen v. Buckly*, 1 Lev. 109; 1 Sid. 157; Raym. 80. Before the 4th and 5th Anne, however, the grantee of a reversion without attornment could not sue (*Vandeput v. Lord*, 1 Stra. 78. *Moss v. Gallimore*. 1 Dougl. 283: *per Buller, J.*), unless the lessee's interest was made to commence after a term *in esse*. *Quarn v. Roe*, Skin. 387.

And as a covenant to insure within the weekly bills of mortality mentioned in the 14 Geo. 3, c. 78, runs with the land, the assignee of the lessor may maintain covenant thereon against the lessee (*Vernon v. Smith*, 5 B. & A. 1); and so may a person, taking under a will a reversion of 1000 years for life, and after to his son and the heirs of his body, bring covenant for non-repair against a lessee. *Dowse v. Cale*, 2 Vent. 126. An instrument also may operate as an assignment, although the assignor reserves a rent to himself and a power of reentry on non-payment, and although covenants different from those in the original lease are inserted, and a party claiming under such a deed may support an action against the assignee of the reversion, but it seems doubtful whether the new covenants are good. *Palmer v. Edwards*, 1 Dougl. 186, n.

If A. devises to B. for life, remainder to C. for life, with power to them successively to lease, a covenant by the lease, with the first tenant for life, his heirs and assigns, to pay rent, &c. will pass to the remainderman under the statute. *Isherwood v. Old-*

(B) *Right of Action on Covenant not Assignable by Law.*

ANDREW v. PEARCE, 1 N. R. 158.

There cannot be a legal assignment of a right of action on a covenant.

Per Sir James Mansfield, C. J. "A right of action on a covenant cannot be assigned by law." *See ante*, Chose in Action, p. 98.

3d. Of the Liabilities of the Parties.

(A) *Who may be Sued, both as regards the Common Law and the Statute.*

(*a*) *Lessee.*

LEWYN v. FORTH, 1 Vent. 185; 3 Salk. 108; 2 Keb. 879.

Lessee is liable to an action on his covenant to repair, when his lease commences in point of computation.[1]

Lessee for forty years underlet to W. R. for five, and afterwards made a lease to L. L. for forty years, who covenanted to repair *durante termino præd.* 40 *annorum*. The under-lessee refused to attorn.

Per Cur. The lessee for forty years is bound to repair, for though his lease had not commenced in point of interest, yet it had in point of computation, and the covenant was to repair during the forty years. See *Lewis v. Hillard*, 1 Sid. 374; S. C. 2 Keb. 291, 377.

(*b*) *Lessee or Assignee at Election.*

BOULTON v. CANON, Freem. 336; 3 Keb. 189, 446, 466, 493; Pollexf. 125; 1 Vent. 271.

Lessee or his assignee may be charged

Per Hale. "If the assignee breaks the covenant, he may be charged, or the lessee, or his executors; but if an assignee assign over, and the second

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know, 3 M. & S. 382. Even a devisee, who had assigned over his reversion, it was held, could maintain covenant against a lessee for rent, due before such assignment (*Anon.* Skin. 367), notwithstanding such reversioner's subsequent acceptance of rent from the assignee. *Ashurst v. Mingay*, 2 Show. 133; T. Jones, 144; Lilly, Ent. 135. *Glover v. Cope*, 4 Mod. 80. A release, however, by a lessor after assignment of his reversion, and before breach, to the lessee, shall not bar the grantee of the reversion, as the word *reddendum* is a covenant in law running with the reversion (*Harper v. Burgh*, 2 Lev. 206; T. Jon. 102); but both grantor and grantee of a reversion cannot bring an action of covenant against a lessee, and a recovery by one is a bar to the other. *Beely v. Parry*, 3 Lev. 154.

[1] We have seen by the very relation of landlord and tenant, the law imposes an obligation on the lessee to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee. He is, therefore, bound to keep the soil in a proper state of cultivation, to preserve the timber, and to support and repair the buildings. These duties fall upon him without any express covenant on his part; and a breach of them will, in general, render him liable to be punished for waste. Co. Litt. 53, a. This obligation, however, extends only to reasonable and usual cultivation, and does not bind the tenant to any extraordinary mode of agriculture. *Brown v. Crump*, 1 Marsh. 567; S. C. 6 Taunt. 300. The liability of the tenant on this point is usually defined by an express covenant; in which case we must look to the particular terms of the lease to ascertain the extent of the liability, without regard to the general obligation imposed by law in the absence of express covenants. All covenants, it may also be remarked, by the lessee for cultivation, run with the land. Shep. Touch. 161; Com. Land and Ten. 171, 180; Woodf. L. & T. 337, 6th ed.

It has been said, that after an assignment by lessee, with consent of lessor, and his acceptance of rent from the assignee, he cannot demand the rent of the lessee (*Whitway v. Pinsent*, Sty. 300); but covenant for rent in arrear, it has been decided, can be maintained against lessee, even after his assignment, on an express covenant, even though notice and acceptance of the rent had been pleaded (*Edwards v. Morgan*, 3 Lev. 233): yet on an implied covenant, it seems the action could not, after assignment, be supported. *Anon.* 1 Sid. 447, pl. 9.

In *Hellier v. Casbard*, 1 Sid. 266, it is said that the words *yielding and paying* make an express covenant and not a covenant in law only; and Rotti. Covenant, 519, was cited.

Against the king's lessee by patent covenant lies, although there is no sealing by him. *Wooton v. Hele*, 1 Mod. 292.

assignee break the covenant, the first assignee cannot be charged; but the second assignee that broke the covenant, or the lessee, or his executors, may. for breach of covenant at the election of the lessor.[1]

(*c*) *Heir.*[2]

(*d*) *Executor or Administrator.*

PLUMER v. MARCHANT, 3 Burr. 1380.

An action of covenant is as much a lien upon the assets in the hands of an administrator, as an action of debt, and is also a debt of an equal nature. An action of covenant is a lien on the testator's assets in the hands of an executor.[3]

BOULTON v. CANON, Freem. 336; Pollexf. 125; 1 Vent. 271.
JENKINS v. HERMITAGE, Freem. 377.

Per Hale. If an executor assign over, he may still be charged for the rent in the *detinet*, if he have assets; but not in the *debet* and *detinet*, but for the time that he occupies. J. S., lessee for years, rendering rent, assigns and dies, his executor, if he have assets, may be charged in the *detinet*, or in covenant.

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[1] A lessee derives, by virtue of the deed and the different covenants therein contained, both a privity of contract and a privity of estate, and is as such liable on all the conditions in the lease, although he may assign, and thereby destroy the privity of estate; yet the privity of contract continues unaffected by the assignment (Dougl. 736); consequently, if a lessee covenants that he and his assigns will repair the estate demised, and the assignee does not fulfil the covenant, an action lies at the election of the lessor, either against the lessee or assignee (Cro. Jac. 533), or against both: but in such case execution can only issue against one. Id. 534.

[2] On a covenant by the ancestor, for himself and his heirs, an action will lie against his heir, nor need the declaration allege that the heir had lands by descent, but if he had none he might plead it by way of defence. *Dyke v. Sweeting*, Willes, 585.

The heir or devisee of a party contracting under seal is liable for any breach of covenant when *expressly named* in the contract, provided he have legal assets by descent from the covenantor (Plowd. 439; 2 Saund. 136); and if there be several heirs, as in the case of parceners or gavelkind, they must all be joined, or the defendant may plead the non-joinder in abatement. 2 Vin. Abr. 67; Petersdorff's *Suppl. to Black.* p. 96.

[3] The executor or administrator will be liable for breach of all covenants in his testator's lifetime, in respect of any assets that may come into his hands, whether he be named or not, unless it be such a covenant as could only be performed personally by the covenantor, and, therefore, expires upon his death. Shep. T. 178. *Hyde v. Dean, &c., of Windsor*, Cro. Eliz. 552. *Anon.* Dyer, 324, a, pl. 34. *Pitcher v. Tovey*, 4 Mod. 71; 1 Salk. 81; 2 Vent. 234; 3 Lev. 295; 1 Show. 340; Carth. 177. And upon a covenant in law the executor will not be liable after the determination of the estate concerning which the covenant is made. Where, therefore, A., tenant for life with remainder to B. in fee, demised by indenture to C. for fifteen years, and then died, upon which B. entered upon C., the court held that C. could not charge the executor in an action upon the covenant in law, because the covenant determined by the death of the tenant for life, though they agreed it would be otherwise upon an express covenant for quiet enjoyment. *Swan v. Stransham*, Dy. 257, a; S. C. 1 And. 12; Mo. 74; Bendl. 150.

And although "assigns" are not named, as the covenant runs with the land, the administrator of an assignee is bound to repair (*Keeling v. Morrice*, 12 Mod. 371), though the heir, in case he be named, and the executor and administrator, are chargeable upon the covenants of the lessee in respect of assets only, yet if they enter into the land demised they then become chargeable, as assignees, for future breaches of covenant, and for such will be liable *de bonis propriis*. *Tilney v. Norris*, Ld. Raym. 553; S. C. Carth. 519; 1 Salk. 309. *Derisley v. Custance*, 4 T. R. 75; Com. Land. and Ten. 254, 419.

And if a lessee covenants for himself, his executors, and assigns, his funds are liable in the hands of his executor for a breach committed by the assignee of the lease, after the testator's death. *Wilson v. Wigg*, 10 East, 313.

On a covenant to pay, "so as notice be given to the covenantor," his executors are liable (although not named) after his decease, if notice be given to them, notwithstanding no notice was given to the testator. *Harwood v. Hilliard*, 2 Mod. 268; S. C. 3 Keb. 848. And where the covenant was by the grantor of a rent-charge, "for him, his heirs and executors, *to pay*, &c.," it seems an action of covenant was held to lie against the executor for rent, accruing after the death of the grantor, although the grantee had entered pursuant to a clause in the deed for rent in arrear previous to the

ANDREW v. PEARCE, 1 N. R. 158.

An interest must pass to an assignee to render his executors liable.

Tenant in tail male demised certain premises to A. B., for ninety-nine years, and covenanted that he had good right to demise, and for quiet enjoyment by the lessee, his executors, administrators, and assigns. A. B. assigned to C. D. The tenant in tail male died without issue male, and C. D. then assigned to the plaintiff, who was evicted by the defendant, the executor of the lessor, under a title superior to that of the lessor. To plea, stating these facts, the plaintiff demurred.

Per Cur. The lessor had no power to make a lease to continue for ninety-nine years if he should die without issue male. At his decease the lease became absolutely void; it was impossible, then, that any interest under it could pass to the plaintiff. If anything remained in C. D., it could only be a right of action on the covenant; and that could not be assigned by law. The assignment, therefore, could have no operation, as the person who made it had no interest in the premises.—Judgment for the defendant.

(e) *Assignee, in what cases Bound.*[1]

death of the grantor. *Fountain v. Guavers*, 2 Show. 333; Comb. 59; Skin. 146.

Covenant for non-repair by an administrator in his own time is well brought against him as an assignee. *Tilney v. Norris*, Carth. 519; 1 Ld. Raym. 553; Salk. 309. He is also liable *de bonis testatoris*, after his assignment (*Boulton v. Canon*, Freem. 336; Pollexf. 125; 1 Vent. 271), and may still be charged in the *detinet*, or in covenant for rent, if he have assets. *Boulton v. Canon*, *supra* in text. Where, however, tenant in tail leased for ninety-nine years, and died without issue, his executor was held not liable on the covenant for quiet enjoyment, in an action brought by A. B., to whom the premises had been assigned after the death of the tenant in tail without issue, as the lease was then void, and no interest passed to the assignee. *Andrew v. Pearce*, *supra* in text. When a deed is void, all the covenants, if dependent, contained in it are also void (*Soprani v. Skurro*, Yelv. 18); therefore, where A., being possessed of a term of years, granted so much of the term as should be unexpired at the time of his death, and the grantee assigned it to B., and covenanted that B. should enjoy against all persons. Upon an action upon this covenant it was held that, the original grant being void for uncertainty, the covenants in the assignment which depended upon the grant were also void; and judgment was given for the defendant. *Capenhurst v. Capenhurst*, Sir T. Raym. 27; S. C. 1 Lev. 45; 1 Keb. 164. And so where a lease was holden void to pass any interest in the land, a reservation of rent therein was holden to to be void, because it depended upon the original lease. *Frontin v. Small*, 1 Stra. 705. See *Northcote v. Underhill*, 1 Salk. 199; Ld. Raym. 388. So, where A. covenanted with B. to pay him and his wife and survivor a weekly sum, and B. in consideration covenanted that he would not sell newspapers, this restriction did not extend to B.'s wife, although she were administratrix, for the executors were not bound by it. *Cooke v. Colcraft*, 3 Wils. 380; 2 W. Black. 856.

When the covenant is joint and several the survivor, or the executor of the deceased covenantor, may be sued. *May v. Woodward*, Freem. 248.

[1] The assignee of a term is subject to all covenants which are annexed to the estate: and to operate on a thing in being parcel of the demise, as to repair, pay rent, &c., for the assignee by his acceptance of the possion of land, renders himself liable to every covenant, although not expressly named, which runs with the estate, and are, as it were, annexed and inseparable to its enjoyment, though, if the act covenanted to be done is merely personal or collateral to the thing demised, as a clause to build a house which does not form any part of the demise, or to pay a sum of money in gross or other conditions which do not run with the land, an assignee will not be bound by such, even though expressly named; but when that is the case, although the covenant may relate to a thing not *in esse* at the time of the grant, and in some respects collateral, as to build a new wall upon the estate demised, it will extend to the assignee, as he will derive a benefit from it. See *Spencer's case*, 5 Co. 16, a; 2 C., M. & R. 18.

An agreement was entered into by the plaintiff and Lee to grant a lease of twenty-one years to the Messrs. Harters, of certain land, for the purpose of forming a railway. A covenant was inserted that the Harters, their executors, administrators, and assigns, should carry over the railway all coals gotten by them from the Hatfield Colliery, and also all coal they should obtain from any other mines they might afterwards work in the township of Stanley, paying 2*d.* for every ton of coal so carried. The plaintiff became the sole owner of the land demised. The Harters assigned all their interest in the agreement to the defendants, who refused to pay the 2*d.* per ton upon any other coal than that obtained from the Hatfield Col-

TATEM v. CHAPLIN, 2 H. Black. 133.

A covenant for constant residence on a demised farm is binding on the lessee's assignee, though not named, being *quodam modo* annexed to and appurtenant to the thing demised.

This was an action of covenant brought by the lessor of a farm against the assignee of the lessee for a breach of covenant, whereby the lessee for himself, his executors and administrators, covenanted that he, the said lessee, his executors and administrators, should with his and their family and servants constantly reside upon the demised premises during the demise, under a penalty of 5*l.* per month. The breach assigned was that the defendant (the assignee), after the said assignment of the said demised premises, had not with himself, his family, and servants, resided in and upon the said demised premises, but, on the contrary, had totally absented himself, &c. To this there was a general demurrer, and joinder in demurrer.

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liery, and used another railway for such other coal:—*Held*, that the covenant ran with the land, and the defendants were bound by it. *Hemmingway v. Fernandez*, 12 L. J. Ch. 133; 7 Jur. 888.

W. M., described in the deed as mortgagor, and R. J. as the mortgagee of one undivided moiety, and J. M. as being entitled to the other, executed a lease of the whole premises, the demise being, "W. M. and R. J., and as to W. M., by the direction and with the consent of J. M., testified by her being a party and executing these presents, do, and each of them does, grant, demise, and lease unto G. and his assigns," &c., the *reddendum* being general (without saying to whom), and G. covenanted with the three jointly and severally to pay the rent as reserved. Declaration on this deed by the three lessors jointly against the defendants as assignees in bankruptcy of G., alleging that G. had entered under the deed, that the defendants had elected to take the lease, and that rent had accrued due since such election. *Plea*, that W. M. had no reversion:—*Held*, on demurrer, on the authority of *Wakefield v. Brown*, 9 Q. B. 209, 15 L. J. Q. B. 373, that the action was well brought, and the plea bad. *Magny v. Edwards*, 13 C. B. 479; 17 Jur. 839; 22 L. J. C. P. 171.

By a deed, B., the lessee, for himself, his executors, administrators, and assigns, covenanted with the lessor to build four messuages on the land within a specified time from the date of the demise, and to pay rent, and there was a clause for re-entry on non-performance of this or certain other covenants. By a subsequent deed, B. demised to plaintiff (the houses not having been built), and covenanted with plaintiff that B., his heirs, executors, administrators (not adding assigns) would pay the rent reserved by the former deed, and perform, or effectually indemnify plaintiff of, from, and against all the covenants therein contained on the lessee's or assignees' part to be performed. B. afterwards assigned to defendants:—*Held*, by the Court of Exchequer Chamber, affirming the judgment of the Queen's Bench, that the covenant to plaintiff was not such a covenant as would pass with the reversion of the land, and bind assignees not named, and, therefore, that the plaintiff could not recover against the defendants for not building the wall, or indemnifying the plaintiff against eviction for breach of the covenant to build. *Doughty v. Bouman* (in error), 11 Q. B. 444; 12 Jur. 182; 17 L. J. Q. B. 111; Ex. Ch. S. C. in court below, 16 L. J. Q. B. 414.

So is a covenant by a lessee of tithes, for himself and his assigns, not to let any farmers of the estates have any part of the tithes (*Bally v. Wells*, 3 Wils. 25); or to repair, and an assignee of part of the premises is equally liable (*Conan v. Kemise*, Sir Wm. Jones, 245). So also is the assignee of a lease for payment of an *apportioned* rent in respect of his privity of estate, although he be evicted of a moiety of the premises by title paramount. *Stevenson v. Lambard*, 2 East, 575.

An interest in a navigation, or a mere easement, may be a real hereditament, and render the assignee of the grantee liable, it was said, under the stat. 32 Hen. 8, c. 34, for a breach of covenant (*The Earl of Portmore v. Bunn*, 1 B. & C. 694); but a covenant to insure is a continuing covenant, and, therefore, a distress, though a waiver at that time, is not a waiver of a subsequent breach of covenant to insure. *Doe d. Flower v. Peck*, 1 B. & Adol. 428.

An assignee is not liable for breach of a covenant not relating to a thing *in esse* at the time of the demise, unless expressly named (*Grey v. Cuthbertson*, 2 Chit. Rep 482); such as a covenant by a lessee of a public-house, that he and his assigns will buy all their beer of the plaintiffs. *Sed quære? Hartley v. Peehall*, Peake, 131. Or a covenant to build (*Anon.* 12 Mod. 384). But if the covenant be merely to build a house within such a time, an action will not lie against the assignee after breach committed by his assignor. *Grescot v. Green*, 1 Salk. 199; Holt, 177.

A covenant in which an assignee is specially named will not run with the land, or be binding on him, unless it affect the nature, quality, or value of the thing demised, independently of collateral circumstances, or affect the mode of enjoyment (*The Mayor, &c. of Congleton v. Pattison*, 10 East, 130. On this ground it has been held that a covenant by a lessor with his lessee, to give him a right of pre-emption of an adjoining parcel of land, does not run with the land, being to do a thing collateral to the demised premises. *Collison v. Lettsom*, 6 Taunt. 224; 2 Marsh. 1.

Per Cur. The covenant in question was *quodam modo* annexed and appurtenant to the thing demised, according to the first and sixth resolutions in *Spencer's case*, 5 Co. 16, a, which were directly in point, and, therefore, the assignee was bound, though not named.—Judgment for the plaintiff.

See Cro. Jac. 438; 5 Co. 24, a; 3 Burr. 1271; 1 Ld. Raym. 317.

(*f*) *By what Acts he may Discharge himself of his Liability.*[1]

(*g*) *What Acts are sufficient to constitute him Assignee; and herein of Assignees of Bankrupts.*[2]

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[1] Although covenant lies against an assignee of a term by an assignee of a reversion, for rent due before a grant over of the reversion by him (*Midgleys v. Lovelace*, 12 Mod. 45; Carth. 289; Holt, 74), yet an assignment over by the assignee of the lease will discharge him from payment of rent due after such assignment, although no notice of it was given by him. *Pitcher v. Tovey*, 4 Mod. 71; 1 Salk. 81; 2 Vent. 234; 3 Lev. 295; 1 Show. 340; Carth. 177.

The assignee of a lease being liable upon the covenants merely in respect of privity of estate, and no privity of contract existing between him and the original lessor, it follows that his liability can only last so long as he remains possessed of the estate. As soon as he assigns the whole of it over, the privity is destroyed and his liability ended, though the assignment be made without notice to the lessor. Nor will any assignment to a mere pauper be deemed fraudulent, the lessor still retaining his right of action against the lessee on the privity of contract (*Lekeux v. Nash*, 2 Stra. 1221. *Valliant v. Dodemede*, 2 Atk. 546). And so an assignment to a feme covert will discharge the assignee (*Barnfather v. Jordan*, Dougl. 452), for a feme covert is of capacity to purchase of others, without the consent of her husband; and though he may disagree and divest the estate, yet, if he neither agree nor disagree, the purchase is good. Co. Litt. 3, a.

Nor after such assignment will he be liable for repairs (*Keeling v. Morrice*, 12 Mod. 371); nor will he be liable to an action for covenant broken before the assignment to him (*Churchwardens of St. Saviour's v. Smith*, 1 W. Black. 351; 3 Burr. 1271. *Grescot v. Green*, 1 Salk. 199; Holt, 177. *Brittin v. Vaux*, Lutw. 127). Nor can covenant for rent in arrear due after his assignment over be maintained against an assignee, declared against such, although the original lessor was a party to the first assignment, and thereby consented that the term before determinable at option should become absolute (*Chancellor v. Poole*, 2 Dougl. 764); nor, if the grantors have neither a legal nor equitable interest in the hereditament which they profess to grant, is the assignee of the grantee liable to the covenants contained in the deed. *The Earl of Portmore v. Bunn*, 1 B. & C. 694; 3 D. & R. 145.

[2] It has been held that covenant for rent due after assignment would not lie against an assignee by way of mortgage before entry (*Eaton v. Jaques*, 2 Dougl. 455); but it is now settled that the assignee of a term assigned by way of mortgage for securing a sum of money and interest, is liable on the covenants in the lease for payment of rent, although he has never entered or taken actual possession. *Williams v. Bosanquet*, 3 J. B. Moore, 500; 1 B. & B. 238.

In *Stone v. Evans*, Woodf. L. & T. 84, 6th ed. the plaintiff in this case was the original lessee of a term, which he assigned to K., who assigned it by way of mortgage to the defendant, as security for a repayment of a money. The action was brought to recover the amount of the ground-rent paid by the plaintiff during the interest of the defendant as mortgagee. *Lord Kenyon* said that the defendant was liable as assignee; his liability was not limited by his possession; but as long as he had the legal estate, so long he continued liable to perform the covenants in the lease; that it was immaterial whether it were an assignment of the usual kind or by way of mortgage; and he declared he would overrule the case of *Eaton v. Jaques* without scruple.

These decisions render it imperatively incumbent on the mortgagee to take an underlease for his security, instead of an assignment of the whole term. By this means, the legal privity between the mortgagee and the landlord will be destroyed (Dougl. 174); and the former not liable to the covenants in the original lease. As to what will be considered an underlease, the reservation of a month, a week, or even a day will be sufficient to save the mortgagee. But the old practice of reserving rent merely, or a right of entry to the assignor, is very reprehensible. Indeed it is now settled, that though the instrument import to be a lease at a reserved rent from the lessee to the mortgagee, yet if in effect it comprise all the estate which resides in the lessee, it will amount to an assignment, and not to a lease or underlease. See *Palmer v. Edwards*, Dougl. 187, *in notis;* and further, *Goddard v. Keate*, 1 Vern. 87; 1 Fonbl. Tr. Eq. 357; Shep. Touch. 211; and Pow. Mortg. by Coventry, p. 179, *in notis.*

But an assignee after an assignment over by him, and before entry of the second assignee, is not liable to covenant for rent due after the assignment. *Walker v. Reeves*, 2 Dougl. 461, n. i.

An assignee of a lessee for a year, holding over after the year, is within the term assignee on a covenant to pay rent (*Bromefield v. Williamson*, Sty. 407). So, if a lease is as-

4th. Of Covenants between Master and Apprentice;[1] and some of a Special Nature.

signed to a trustee only for securing an annuity, and he tells the tenant in possession that he is landlord for his client, and must have the rent paid to him, this is sufficient to constitute him an assignee, and liable for rent to the superior landlord (*Gretton v. Digles*, 4 Taunt. 766). Likewise, if A. becomes the purchaser of a lease at an auction, and pays a deposit, and an assignment is executed by the assignors, he is liable for rent in arrear, although he never executed the assignment, which remained in the solicitor's hands, he having a lien thereon for the costs of preparing it (*Odell v. Wake*, 3 Camp. 394); or if A. covenants for himself and under-tenants, the assignee of an under-lessee is an under-tenant to A. within the clause (*Burman v. Aston*, 1 Lev. 144; 1 Keb. 775, 806; *nom. Boarman v. Aston*, or *Acton*). Covenant, however, cannot be supported against the devisees of an equity of redemption (the legal fee being in a mortgagee) on a declaration charging the defendants as assignees of *all the estate*, &c. of the covenantor (*The Mayor, &c. of Carlisle v. Blamire*, 8 East, 487). Where, therefore, a lessee for lives demised, granted, bargained, sold, assigned, transferred, and set over the premises, and all his estate, &c. therein, *habendum* to B. his executors, &c. for 99 years, if, &c. this was held not to operate as an assignment, and consequently covenant could not be maintained by the reversioner against B. for not repairing (*The Earl of Derby v. Taylor*, 1 East, 503). But a declaration on a covenant which runs with the land, charging the defendant as *assignee*, will be supported by evidence that he is in as *heir*. *Derisley v. Custance*, 4 T. R. 75.

An estate was conveyed to A. to such uses as B. should appoint, and in default of appointment to B. in fee: B. covenanted for himself, his heirs and assigns, to pay the grantor, his heirs and assigns, a fee-farm rent, and afterwards sold the estate to the defendant; and it was held that, as the latter took under B.'s appointment, and not under his interest, the purchaser was not liable to, nor was the land in his hands bound by B.'s covenant (*Roach v. Wadham*, 6 East, 289; 2 Smith, 376); nor can covenant for rent be maintained by the original landlord against an under-lessee, as he is not substantially an assignee. *Holford v. Hatch*, Dougl. 183.

If A. covenants for himself and his assigns with his lessee to permit him to do an act, this covenant will not include assigns before the demise. *Target v. Lloyd*, 2 Vent. 277.

In the case of assignees of a bankrupt, they are not liable in covenant for rent in arrear, unless they take possession. *Bourdillon v. Dalton*, Peake, 238; 1 Esp. 234.

On reference to vol. ii. p. 241, will be found the class of cases explaining what acts performed by a bankrupt's assignees amount to evidence of an intention on their parts to take such possession; and, consequently, fixing on them the character of assignees of a term, as to render them liable to the covenants contained in a lease belonging to the bankrupt.

[1] Master may bring covenant on the indenture against his apprentice for words spoken to his damage (*Taylor v. Becket*, 1 Lev. 307); but not if he be an infant (*Lylly's case*, 7 Mod. 15; Com. Rep. 38). And an action of covenant may be maintained for an apprentice's absenting himself contrary to articles, although the master receive him again, but such circumstance should go in mitigation of damages. *Hawkins v. Easterbrooke*, Sayer, 115.

By the terms of an indenture of apprenticeship, an infant was placed by his father (who was a party to the indenture) as apprentice to a master described in the indenture as "an auctioneer, appraiser, and corn-factor," to learn his art, and with him after the manner of an apprentice to serve. After the making of the indenture and the commencement of the apprenticeship the master wholly relinquished the trade of corn-factor, whereupon the apprentice absented himself from his master's service:—*Held*, in an action on the indenture by the master against the father for the desertion of the apprentice, that the relinquishment by the master of his trade of corn-factor was a good answer to the action. *Ellen v. Topp*, 6 Ex. 424; 15 Jur. 451; 20 L. J. Ex. 241.

For further information respecting the relative rights and liabilities of master and apprentice, see vol. i. p. 402.

An action lies against husband and wife on her covenant *dum sola*, although breach committed after marriage. *Anon.* 6 Mod. 239. Though a covenant by a *feme covert* with a servant for her hire will not, but if the servant perform the services, *assumpsit* will lie against the husband (*White v. Cuyler*, 1 Esp. 200; 6 T. R. 176). An action also lies against the surviving wife, on a fine *sur concessit* for years with a general warranty, levied by her and her husband. *Wooton v. Hele*, 1 Mod. 290; 2 Saund. 177; 1 Lev. 301; 1 Sid. 466.

If three directors execute a policy of insurance, by which it is stipulated and declared that the insured shall be entitled to remuneration in case of fire, an action of covenant will lie against them to the extent of the sufficiency of their funds. *Andrews v. Ellison*, 6 J. B. Moore, 199.

Unusual covenants will not bind a bishop's successor (*Davenant v. the Bishop of Salisbury*, 2 Lev. 68; 1 Vent. 223); nor, if A. reserves a right of cutting timber, making compensation to the lessor for damage done, is he liable for the acts of a wrongdoer in an action of covenant, and no subsequent pro-

IV. Of the Remedies for Breach of Covenant.[1]

mise to make compensation will make that a breach which was no breach before. *Griffiths v. Bromf*, 6. T. R. 66.

[1] The legislature has now, to a certain extent, conferred the jurisdiction of the Court of Chancery upon the courts of law,—namely, by 4 Geo. 2, c. 28, ss. 2–4; and 15 & 16 Vic. c. 76, ss. 210–212. And a similar jurisdiction has been very lately conferred by statute on the courts of equity,—namely, by 22 & 23 Vic. c. 35, so as to enable those courts to relieve against the consequences of failing to insure against loss or damage by fire; and by the stat. 4 Geo. 2, c. 28, relief in case of non-payment of rent may be obtained in equity for a period of six months after execution in an action of ejectment. In courts of law, on the other hand, the relief can only be granted up to the time of trial. These remedies form the subject of the first eleven sections of the 23 & 24 Vic. c. 126, the general effect of which is: 1, that in any ejectment brought for a forfeiture by reason of the non-payment of rent, the court or a judge may give relief (upon rule or summons) in a summary way, and without any fresh lease being requisite, subject however to the terms and conditions in all respects as to payment of rent, costs, and otherwise as would be imposed by the Court of Chancery upon a bill for relief (sect. 1); and 2, that in case of any ejectment for a forfeiture by reason of a breach of a covenant or condition to insure against loss or damage by fire, the court or judge may grant relief summarily, in like manner and on such terms as would be imposed in Chancery in all cases in which relief in Chancery may now be obtained under 22 & 23 Vic. c. 35, s. 2.

An appeal, however, is provided in both cases up to and within the like time after execution executed as would be allowed by the Court of Chancery from the decision of a judge in full court (sect. 4), and from the decision of the court to the ordinary courts of error (sect. 6), in the form of a case stated (sect. 9). The court of appeal has, moreover, the power to give such judgment or make such rule as ought to have been had in the court below, or to remit the cause with such directions as they may think proper (sect. 10), and also to adjudge costs and to order restitution (sect. 11).

A few observations explanatory of the construction of covenants in a court of equity, and of the means of redress there afforded, may not be irrelevant.

The construction of covenants is the same in equity as at law, but the performance of them is considered very differently in courts of law and equity. At law, a covenant must be strictly and literally performed; in equity, it is sufficient if it be really and substantially performed, according to the true intent and meaning of the parties, so far as circumstances will admit; and if, by unavoidable accident, or by fraud, surprise, or ignorance, not wilful, parties have been prevented from executing it literally, a court of equity will interfere, and, upon compensation being made, the party having done everything in his power, and being prevented by the means alluded to, will give relief.

In cases of a contract by lease to pay rent, with a covenant and clause of re-entry on non-payment, a court of equity has from the earliest times (there is a case in Cary, p. 45) relieved the tenant on payment of the rent with interest and all expenses, and will not let him be turned out of possession. Francis's *Max. in Equity*, p. 5. *Sanders v. Pope*, 12 Ves. 289.

Relief will under circumstances be given upon a breach of covenant by a lessee as to the mode of cultivation (*Lovat v. Lord Ranelagh*, 3 Ves. & B. 29); but it seems clear, that if the tenant's conduct, with reference to his covenant, has been gross and ruinous, relief would not be given to him (see *Hill v. Barclay*, 16 Ves. 404); nor will relief be granted if the premises, being much out of repair and the landlord making a requisition to repair, the tenant refuses to comply. (Id. 18 Ves. 64.) Wherever, indeed, there has been a wilful voluntary breach of a covenant, a court of equity will not relieve. *De Scarlett v. Dennett*, 9 Mod. 22. *Eaton v. Lyon*, 3 Bro. 693. *Hill v. Barclay*, 18 Ves. 62. *Reynolds v. Pitt*, 19 id. 143.

If a covenant be to do or not to do some particular act, or doing it or neglecting to do it, to pay a certain sum by way of liquidated damages, courts of equity will not relieve against the payment of such damages (*Roy v. Duke of Beaufort*, 2 Atk. 194. *Blake v. East India Co.* Finch, 117; S. C. 2 Chan. Cas. 198. *Rolfe v. Patterson*, 6 Bro. P. C. 470; approved in *Hardy v. Martin*, 1 Cox, 27. *Small v. Fitzwilliams*, P. C. 102. *Ponsonby v. Adams*, 6 Bro. P. C. 417. *Astley v. Weldon*, 2 B. & P. 346; and *see* dict. *Street v. Rigby*, 6 Ves. 818); as where there is a *nomine pœnæ* in leases, to prevent a tenant from ploughing. *Benson v. Gibson*, 3 Atk. 395. *Woodward v. Gyles*, 2 Vern. 119. *See* dict. in *Blake v. East India Co.* 2 Chan. Cas. 199.

Courts of equity interfere in many cases to restrain a breach of covenant (*Barrett v. Blagrave*, 5 Ves. 555; S. C. 6 Ves. 104); as where a tenant is carrying off a farm, manure, &c. he had covenanted to consume upon it; but where a covenant is of such a description that a breach of it can only be ascertained, in each instance, by a trial, the court will not interfere. See *Collins v. Plumb*, 16 Ves. 454; and what is said in *Kimpton v. Eve*, 2 Ves. & B. 353. An injunction has been granted to restrain a tenant of a farm from breaking up meadow for the purpose of building, contrary to express covenant (*Lord Gray de Wilton v. Saxon*, 6 Ves. 106); or

(A) *On what Deeds Covenant may be brought.*

Wooton v. Hele, 1 Mod. 292.

Per Twisden, J. "Sealing is not always necessary to found an action of covenant. Thus, covenant lies against the king's lessee by patent, upon his covenant in the patent, although there is no sealing by the lessee." *See post*, Deed.

Although to found an action of covenant sealing is not always necessary;

Hollis v. Carr. In Chan. 2 Mod. 87; S. C. Finch, C. R. 261; S. C. 2 Freem. 3.

Per Finch, Lord C. "Wherever there is an agreement under hand and seal, covenant lies."

yet, on all agreements under hand and seal covenant lies.

Cooker v. Child, 2 Lev. 74, 115. Lowther v. Kelly, 8 Mod. 115.

The defendant demanded oyer of the indenture, which was entered thus:— "This indenture charter-party witnesseth, that B. master and part owner of the ship, with the consent of C (the plaintiff), the other part owner, lets the ship to the defendant for a voyage:" the defendant then covenanted to pay B. so much as master, and covenanted with B. *necnon cum prædict.* C. to pay C. 300*l*. The defendant pleaded that only he and B. were parties, and sealed and delivered the said charter-party, and that the plaintiff was no party. It was argued for

And on a deed-poll.[1]

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from sowing it with mustard seed. *Pratt v. Brett*, 2 Madd. Rep. 62.

When a covenant has been permitted to stand for a length of time (eleven years, for instance), an ineffective part of the lease, the court, it seems, would not interfere on behalf of the lessor to enjoin the lessee; but on a bill filed by the lessee would restrain the lessor from suing at law upon such covenant. *Barrett v. Blagrave*, 6 Ves. 106.

Frauds on covenants are relieved against. If, for instance, a father covenants on his daughter's marriage to leave her at his death a full and equal share of his personal estate with his son, and afterwards transfers his personal estate in the funds into his son's name, who verbally promised to pay the father the dividends for his life, this will be set aside as a fraud on the covenant. *Jones v. Martin*, 6 Bro. P. C. 437, and 8th vol. p. 242.

The specific performance of covenants is also frequently sought in equity. Covenants which are said to run with the land will be decreed to be specifically performed, for or against (as the case may be) successive owners of such land. 1 Eq. Cas. Abr. 473. The court will not give a specific performance according to the letter of the covenant, where there has been a change of circumstances; but it seems, in such case, it will execute the covenant according to a conscientious modification of it, to do justice as circumstances will permit. *Davis v. Hone*, 2 Scho. & Lef. 348.

When a person *seised of lands* agrees by articles to settle lands of a certain value, the articles have been held to be a lien on the lands, of which such person was then seised, though no particular lands were mentioned in the articles. *Roundell v. Breary*, 2 Vern. 482, confirmed 3 Atk. 327, 329. *Coventry v. Coventry*, Gilb. 168. So where tenant for life, with power to make a jointure of 500*l*. a-year, in consideration of marriage and 10,000*l*., covenants to make such jointure, but dies without doing it, it has been held, that the articles are a lien on the estate, and that by the execution of them the covenantor became a trustee for the *feme*. (Id.)

Where a husband is bound by his covenant, or his trustees are bound with his consent, and with his money, to purchase and settle lands, and he does purchase lands of less (*see* 2 Atk. 635. *Lechmere v. Carlisle*, 3 P. Wms. 228), equal (*Wilcox v. Wilcox*, 2 Vern. 558, relied on 2 Atk. 634. *Deacon v. Smith*, 3 id. 323), or greater (see *Garthshore v. Chalie*, 10 Ves. 9) value than the sum he covenanted to lay out, but does not settle them, he is (unless the land be copyhold, *Attorney-General v. Whorewood*, 1 Ves. 541) presumed to have made the purchase for the purpose of the settlement. *Lench v. Lench*, 10 id. 516.

But the court will not decree a specific performance of covenants of every description. It is only where the party wants the thing *in specie*. *Errington v. Aynesley*, 2 Bro. C. C. 341; and where the legal remedy is inadequate or defective, that a court of equity interferes. *Flint v. Brandon*, 8 Ves. 163. A parol agreement, concerning *personal estate*, to any extent, if reasonable and proved, is binding, and may be discharged by parol (*Gibbons v. Caunt*, 4 id. 847–849); but, in general, a bill will not lie for a specific performance of a covenant for chattels, or which relate to merchandise, or for stock; for damages in these cases may, with equal advantage, be recovered in an action. *See* Bunb. 135. *Errington v. Aynesley, supra. Flint v. Brandon, supra. Nutbrowne v. Thornton*, 10 Ves. 161.

[1] Thus a stranger may bring covenant on

the plaintiff on demurrer, that this was not an indenture between parties, but only a deed-poll, whereby the party might covenant with a stranger, and also with other persons, to do several other acts, for which every one severally might bring his action. And of this opinion was the whole court, and judgment was given for the plaintiff.

(B) *Form of the Action.*[1]

an indenture sealed, not being *inter parties*, for it has the operation of a deed-poll. *Cooker v. Child*, *supra* in text.

So A. shall be personally liable on a deed, in which he is described as covenanting for and on behalf of B., that B. shall do something (*Appleton v. Binks*, 5 East, 148; 1 Smith, 361), even if he be not named a party, but he must seal the deed (*Salker v. Kidley*, 1 Show. 58; Holt, 210; Carth. 76); and must be named therein (*Green v. Horne*, 1 Salk. 197; S. C. Comb. 219): but on a deed in which an individual covenants on behalf of the public, and in performance of a public duty (*Allen v. Waldegrave*, 8 Taunt. 566; 2 J. B. Moore, 621); or a servant of the crown on behalf of her majesty, the party is not personally liable. *Unwin v. Wolseley*, 1 T. R. 674. *Macbeath v. Haldimand*, id. 172.

A deed also executed by the committee of a lunatic, as committee, in his own name (*Knipe v. Palmer*, 2 Wils. 130); or by an attorney in his own, instead of his principal's name, cannot be the foundation of an action of covenant (*Frontin v. Small*, 2 Ld. Raym. 1418; 1 Stra. 705. *White v. Cuyler*, 6 T. R. 176. *Lowther v. Kelly*, 8 Mod. 115), unless, likewise, a deed be enrolled in pursuance of an act of parliament, covenant cannot be brought upon it. *Poulson v.* ——, 3 Lev. 389.

When a deed is executed by attorney, the attorney ought to deliver the deed in the name, and as the act, of his principal. *Combe's case*, 9 Rep. 75. *Hawkins v. Kemp*, 3 East, 410. For example, he ought, in the act of delivery, to say, that he delivers this writing as the act of A. B., the person by whom he is constituted, or to that effect; and not to say, he delivers the writing as his own act and deed. He ought also to sign the deed with the name of his principal, either alone, or with the addition of "by C. D. [his own name], his attorney." For the same reason, the principal, and not the attorney, should be named in the deed, as the party thereto; or, if the attorney be named as a party, it should be as a separate agent, for some collateral or distinct purpose; as, to produce title-deeds, or to covenant to produce the deed by which he is constituted attorney, or the like. The attestation, as far as it respects the principal, ought to be in these words, or to this effect: —"Sealed and delivered by C. D. [the attorney] in the name, and as the act and deed, of A. B. [the principal], by virtue of the letter of attorney hereunto annexed;" or, "by virtue of a certain letter of attorney, hereunto annexed;" or, "by virtue of a certain letter of attorney, bearing date," &c. adding the date. See *Wilkes v. Back*, 2 East, 142; 3 Prest. Abst. 67, 68.

On a deed-poll of insurance against fire, however, referring to a printed paper, without seal, stamp, or signature, covenant is maintainable. *Routledge v. Burrell*, 1 H. Black. 255. And an indorsement on a deed after it has been signed by the parties, but written at the same time with the sealing and delivery, is part of the deed. *Lyburn v. Warrington*, 1 Stark. 162.

[1] Covenant is the peculiar remedy for the non-performance of a contract under seal, where the damages are unliquidated, and depend, in amount, on the opinion of a jury, in which case neither debt nor *assumpsit* can be supported. It is the proper remedy, where an entire sum is by deed stipulated to be paid by instalments, and the whole is not due, nor the payment secured by a penalty. Com. Dig. Action (F). And it is frequently more advisable to proceed in covenant on a lease, &c. for general damages, than to declare in debt, for a penalty securing the performance of a covenant; because, if the party elect to proceed for the penalty, he is precluded from afterwards suing for general damages; and he cannot, in case of further breaches, recover more than the amount of the penalty; and in many cases, before he can issue execution, he must proceed under the stat. 8 & 9 Wm. 3, c. 11; whereas, if he proceed in covenant for every repeated breach, he may ultimately recover damages beyond the amount of the penalty. Burr. 1087, 1351; Ld. Raym. 814; Dougl. 97; 13 East, 347, 348. And where rent is due upon a lease, and there has also been another breach, as for not repairing, for which the plaintiff claims unliquidated damages, covenant is preferable to debt, because, in the former, damages for the whole may be recovered. So, where the grantor of an annuity has become a bankrupt, or an insolvent debtor, the grantee should proceed for arrears which become due after the insolvency, by action of covenant on the annuity deed, and not by action of debt on the annuity bond, to which the bankruptcy and certificate would be frequently a bar. Dougl. 97; 2 East, 151. On the other hand, covenant cannot, in general, be supported, unless the contract were under seal; and when it is by parol, the plaintiff must proceed by action of *assumpsit*, &c. (Ld. Raym. 1536; Com. Dig. Pleader, 2 V. 2, Covenant, A. 1; Fitz. N. B. Covenant, G.); unless by special custom in London, and some other

(*a*) *Covenant, or Case.*
(*b*) „ *or Debt.*

March v. Freeman, 3 Lev. 383.

In this case it was said, that in every case where there is a covenant to pay a certain sum, the party may have either debt or covenant for the money.

Where there is a covenant to pay a certain sum,

Sanders v. Marke, 3 Lev. 429.

Per Cur. When damages, which were at first uncertain, are by averment reduced to a certainty, debt or covenant may be maintained.

or where damages are reduced by averment to a certainty, debt or covenant may be maintained.

Anon. Sty. 31.

The defendant covenanted with the plaintiff to pay him so much money as he should expend for repairing and victualling a ship for him; and the plaintiff averred that he had expended 300*l.*, and that he gave the defendant notice of it at such a day; and for non-payment he brought this action. It was objected, on demurrer, that, in this case, the plaintiff should have brought an action of debt, and not of covenant.

Thus, if A. covenants to pay so much as he shall expend in victualling a ship, *covenant* will lie as well as *debt* for non-payment.[1]

But to this *Roll* answered, that it was in the election of plaintiff to bring either an action of debt or of covenant, and that it had been heretofore questioned whether an action of debt would lie in this case; but it was never doubted but that an action of covenant would.

(*c*) *Covenant the only Remedy.*[2]

(C) *Of Notice, in what cases to be given.*[3]

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places (Id. Com. Dig. London, N. 1. Covenant, A.; Vin. Ab. Covenant, A.); or against the lessee or patentee of the Crown, when covenant may be supported, although he did not seal any counterpart of the lease, it being matter of record; and the lessee's acceptance of the demise being in such case as obligatory as an express covenant. Cro. Jac. 399, 521; Com. Dig. Cov. A. 1; Vin. Ab. Cov. B. pl. 1. In some cases, where the breach of a covenant is misfeasance, the party has an election to proceed by action of covenant, or by action on the case for the tort, as against a lessee, either during his term, or afterwards for waste. 2 Black. Rep. 848, 1111. *Sed quære?* See further, 1 Chit. on Plead. 117, 118, 3d ed. On this subject we have a recent case. A lessee by *deed-poll* assigned his interest in the demised premises to A., subject to the payment of the rent and the performance of the covenants contained in the lease. A. took possession and occupied the premises under this assignment; and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time A. continued assignee of the premises, and recovered damages against the lessee. It was held that the lessee might maintain an action upon the case founded in tort against A., for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained a damage. *Burnett v. Lynch*, 5 B. & C. 589.

[1] But covenant does not lie against a devisee, under the stat. 3 Wm. & Mary for a breach by the devisor, that act confining the remedy to action of debt. *Wilson v. Knubley*, 7 East, 128; 3 Smith, 123.

An assignee by assigning does not discharge himself from breach of covenants running with the land, incurred in his time. *Harley v. King*, 2 C., M. & R. 18.

[2] An action on the case for permissive waste cannot be supported against a tenant under a lease with express stipulations, but an action of covenant is the only remedy. *Jones v. Hill*, 7 Taunt. 392; 1 J. B. Moore, 100.

A declaration in debt stated, that by an indenture made between J. H. of the first part, G. M. the defendant, of the second part, W. A. the elder of the third part, W. A. the younger of the fourth part (and the plaintiff of the fifth part), the defendant covenanted with the plaintiff that the defendants, the said J. H., W. A., and G. M., their heirs, executors, and administrators, or some or one them, should or would pay, or cause to be paid, unto the plaintiff, his executors, &c. 300*l.*:—*Held*, that this was a collateral covenant, and that the action for the recovery of the money ought to be in covenant, and not in debt. *Harrison v. Matthews*, 10 Mee. & W. 768; 12 L. J. Ex. (N. S.), 30; 2 Dowl. (N. S.), 318, Ex.

[3] The defendant covenanted, that if certain wood sold by him to the plaintiff did not amount to forty acres, he would make

STEER v. SHALECROFT, 12 Mod. 401; Holt, 177.

Where covenant is to do an act *before* a certain day, the covenantor should give notice.

Per Holt, C. J. If A. covenants to make a feoffment *before* such a day, the covenantor ought to give notice when he will make it, that the covenantee may be there to receive it. It is otherwise if he covenants to make a feoffment *on a day certain;* but, in that case, the covenantor must plead a tender on the last convenient time of that day.

(D) *Parties to the Action.*

(*a*) *In respect of Interest.*

1*st. Joint.*

SANDERS v. JOHNSON, Comb. 230. ECCLESTON v. CLIPSHAM, 1 Saund. 153. PUGH v. STRINGFIELD, 3 C. B. 2; 27 L. J. C. P. 34.

Where the interest is joint, all parties must join in covenant.[1]

Several herald painters covenanted that the work of herald painting should be brought to one shop, and the advantage equally divided. In covenant, the breach assigned was for not bringing the work to the shop, or work-house. It was moved, in arrest of judgment, that the covenant was several (with each

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it up out of adjoining woods: the quantity proving to be less than forty acres, the plaintiff is not bound to give the defendant notice, for where the defendant may by any apparent means come to the knowledge of a thing, notice is not necessary (*Clerke v. Child*, Freem. 254); therefore, on a covenant to permit B. to sow clover when A. sowed barley, A. was not bound to give B. notice of his sowing barley (*Hughes v. Richman*, Cowp. 125); but if A. covenants to make a feoffment *before* such a day, notice must be given to the covenantee; otherwise *on a day certain;* a tender, however, on the last convenient time must be pleaded. *Steer v. Shalecroft, supra* in text.

The declaration stated, that by indenture the defendant covenanted that he would at any time or times thereafter appear at an office for the insurance of lives within London or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do, or permit to be done, any act whereby such insurance should be avoided or prejudiced. It then alleged, that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him; and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso that if the defendant went beyond the limits of Europe the policy should be null and void. *Breach*, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—*Held*, on special demurrer, that the declaration was bad, for not averring that the defendant had notice that the policy was effected. *Vyse v. Wakefield*, 6 Mee. & W. 442; 8 Dowl. P. C. 377; 4 Jur. 509.

[1] In case the legal and beneficial interests are not united in the same person, this term must be understood of the legal interest. *Anderson v. Martindale*, 1 East, 497. Although some of them have not executed the deed (*Vernon v. Jefferies*, 7 Mod. 358; 2 Stra. 1146. *Sanders and others, supra* in text); and although the instrument on which the action is brought contains words also of severalty. *Spencer v. Durant*, Comb. 115; 1 Show. 6.

It has also been held, on demurrer, where, in covenant against the executors of A. B., the plaintiff declared that A. B. covenanted with him and two others, that his executors, &c. should pay to them an annuity for the use of a third person, and averred that the other two never sealed the deed; that all joint covenantees who may sue must sue; and that the declaration was bad, inasmuch as it did not appear that any of the covenantees had not assented to the deed, although they did not seal it. But, *quære*, whether the declaration would have been sufficient, if it had averred that the two covenantees not joined had refused to assent to the deed? *Petrie v. Bury*, 3 B. & C. 353; 5 D. & R. 152.

Where the words of a covenant are expressly joint, it will so be construed, although the interest may be several, and *vice versâ;* but where the words are ambiguous in this respect, they may be construed to be joint or several, according to the intent.

Declaration in covenant, at the suit of E., stated, that F. and W. demised lands and iron mines of one undivided moiety, of which F. was seised in fee, to defendant for a term of years, defendant covenanting with F. and W., and their heirs, executors, &c., to erect and work furnaces, to repair the premises, and work the mines; and that F. died, and plaintiff was F.'s heir; and breaches of the covenants were assigned, committed since F.'s death. *Plea*, that W. survived F.:—*Held*, on demurrer, that the action brought by E. without W. could not be maintained. *Foley v. Addenbrooke*, 4 Ad. &

and every of them); and, therefore, the plaintiffs could not join in this action, for the damages were to go according to the distribution of the profits.

Per Cur. The action is properly brought; for the not bringing the work to the work-house was a joint damage; for it was first to be brought into the joint stock, and then the division was to be made according to the articles.—Judgment for the plaintiff. *See* Bull. N. P. 157, 158; Selw. N. P. 459.

2d. *Several.*[1]

E. (N. S.), 197; 3 Gale & D. 64.

The declaration in covenant stated, that the defendant and others, having formed a scheme for erecting, by subscription, a corn-market at Newcastle-upon-Tyne, executed a deed-poll, whereby they did, for themselves severally and respectively, covenant, promise, and agree to, and with each other, to advance and pay the several sums of money subscribed and placed opposite their respective names, for erecting the corn-market, subject to such alterations as should be thought convenient by the general committee appointed by the subscribers, within four years, and also to make such payments in respect of the said shares as should be deemed expedient by such committee; and the said subscribers and the defendant did for themselves severally and respectively, and for their respective executors and administrators, severally promise and agree with the plaintiffs, in case of the default of such committee to require such payments within four years, then to make such payments unto such persons, and in such proportions, as should be required by the plaintiffs. It then averred, that the plaintiffs did not subscribe any sum of money, but became parties to the deed, in order that, in case of the default of the committee to require such payments within four years, they might receive or appoint such payments from the subscribers, on behalf of the mayor, &c.; that the defendant subscribed to the deed for the sum of 500*l.*; that the committee made default in requiring the shareholders and the defendant to make any payment within four years: wherefore the plaintiffs, after the said four years, required the defendant to pay 150*l.* in respect of his shares. *Breach*, the non-payment thereof. The court were to be at liberty to refer to the deed-poll; and, on reference to it, it appeared that the covenant was by the subscribers to and with each other, and to and with the plaintiffs:—*Held*, that this was *primâ facie* a joint covenant with the subscribers and the plaintiffs, and not a several covenant with the plaintiffs alone. Secondly, that it did not appear from the deed that the plaintiffs had a separate interest; and that the subscribers and the plaintiffs ought to have sued jointly. *Sorsbie v. Park*, 12 Mee. & W. 146: 13 L. J. Ex. (N. S.) 9.

When it appears on the face of the declaration that each of the covenantees is to have a separate interest or estate, then the addition of the words "with each of them" will make the covenant several in respect of their several interests, as if one by indenture demise Black-acre to A., and White-acre to B., and covenant with each of them that he is lawful owner of both the said acres, then, in respect of the several interests, the covenant by those words is made several. 5 Rep. 19 a: *Slingsby's case.*

Where a party covenanted by deed for himself, his heirs, executors, and administrators, with each of certain parties thereto (proposed shareholders, the plaintiff being one, in the term and coal-mines hereafter mentioned), his executors, administrators, and assigns, that he would produce and show a good marketable title to a term of forty-two years, and the seams of coal, &c. by the said deed demised and granted; and that he would effectually assign, assure, and vest the same according to the true intent and meaning of the deed, and that he would, with all practicable speed, proceed with, and within four years complete, the harbour and works:—*Held*, upon an action brought by the plaintiff alone for a breach of these covenants, that they were in their nature several, and, therefore, that the action was rightly brought, and the declaration good. *Mills v. Ladbroke*, 13 L. J. (N. S.) C. P. 122; 8 Jur. 247.

[1] If the interest of the parties be several, each must bring a separate action (*Tippet v. Hawkey*, 2 Mod. 263); therefore, where the covenant was not to do an act without the consent of A. & B., each could sue for a breach. *Wilkinson v. Lloyd*, 2 Mod. 82; 3 Keb. 638.

Where the covenant is a covenant in law, it shall be taken to be joint, if the interest be so, and the action must be brought against the covenantors jointly for a breach at the time of making it; but for a subsequent breach it may be sued severally. *Coleman v. Sherwin*, Salk. 137.

If a covenant be several, each must sue alone; a joint action will not lie (*Servante v. James*, 10 B. & C. 410); but if joint, they must sue collectively. *Lane v. Drinkwater*, 1 C., M. & R. 599; 3 Dowl. P. C. 223; 5 Tyr. 40. Broom's *Parties to Actions*, 6.

If parties bind themselves by counter-deeds, either may maintain covenant on his deed, if independent of each other. *Redford v. Britten*, 1 Bing. N. S. 399; 1 Scott, 245.

An executor may maintain covenant for a breach committed in his testator's lifetime by cutting timber, &c. *Raymond v. Filch*, 2 C., M. & R. 588.

So, the assignee of a lease may sue the assignor for damages occasioned by his non-

3d. Joint and Several.[1]

(b) In respect of Legal Relationship.

1st. Husband and Wife.[2]

2d. Tenants in Common.[3]

performance of covenants which, in the assignment, he had stated he had performed. *Short v. Kalloway*, 11 Ad. & E. 28.

A covenantor being also a joint and several covenantee is no objection, especially if he be dead at the time of action brought. *Rose v. Poulton*, 2 B. & Adol. 822.

The rule as to joint and several covenants is one merely of construction, and parties may by apt words covenant severally, although there be a joint interest. If the words are capable of two constructions, then the legal construction will depend upon the nature of the interest. *Keightley v. Watson*, 18 L. J. Ex. 339; 3 Ex. 716. A. covenanted with B., and as a separate covenant with C.: *Held*, that B. could sue alone, although the deed showed that the considerations moved partly from C., and that C. would, under some circumstances, be interested in the amount recovered. (Id.) A joint and several covenant by A. and other persons that "they, or some one of them," will pay a certain sum, may be declared upon as a covenant by A. to pay. *Caldwell v. Breke*, 2 Ex. 318.

A., by deed, covenanted with B. & C., their executors, administrators, and assigns, to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, and subsequently by another deed, to which neither A. nor B. were parties, disclaimed all the trusts of the first deed:—*Held*, by the Exchequer Chamber, that B. could not alone sue A. upon the covenant during the lifetime of C. *Wetherell v. Langston* (in error), 1 Ex. 634; 17 L. J. Ex. 338, Ex. Ch.

In a deed between G. H., G. B., and others subscribers to a company, of the first part, A. B. and C. D. of the second part, and G. B. and others (being some of the parties of the first part) of the third part, it was stated that the parties of the third part had acted as managing directors, and the parties of the first part had become subscribers, and paid their deposits into the hands of the bankers appointed by the parties of the third part, the receipt of which by the bankers the parties of the third part acknowledged; it was witnessed that, for carrying out the objects of the company, the parties of the first part mutually agreed with each other, and with each and every of the persons who were subscribers, and each of them for himself and as to and concerning only the acts and deeds and defaults of himself, covenanted with A. B. & C. D. in manner following. The deed set out several clauses, the first of which was that the parties of the third part should be managing directors; the seventh and eighth were that the directors should have absolute discretion to do what was necessary for the obtaining an act of parliament, and as to the expenditure of the funds until the act should be obtained, subject to certain provisos. The ninth was that the directors should have power to dissolve the company, and that the deposits were to be returned without any abatement. The tenth was, that if within three years the act was not obtained, the deed should be null and void to all intents and purposes whatsoever, and thereupon the deposits should be returned without any deduction or abatement. After the lapse of the three years, G. H. brought an action of covenant against G. B., and joined A. B. and C. D. as co-plaintiffs:—*Held*, on demurrer to the declaration, first, that there was a misjoinder of plaintiffs. *Higginbotham v. Burge*, 4 Ex. 667; 19 L. J. Ex. 73. *Held*, secondly, that there was no joint covenant by the managing directors to return the deposits. (Id.)

[1] On a covenant by two persons jointly and severally with two others to pay a sum in moieties, the action is well brought by one against one, assigning as a breach that both the covenantors had received so much money, and that the defendant had not paid the moiety (*Lilly v. Hodges*, 8 Mod. 166; 1 Stra. 553). Under a joint and several covenant, one covenantor being an infant does not discharge an adult party. *Gillon v. Lillie*, 1 Bing. N. S. 695.

[2] Husband alone may bring an action on a covenant entered into with him and his wife concerning his houses (*Beaver v. Lane*, 2 Mod. 217; Jones, 367); but where the property in question belongs to the husband and wife, and the action would survive to her, she must be joined (*Dunstan v. Burwell*, 1 Wils. 224): consequently, on a conveyance to a man and his wife and their heirs, she must be a party in an action of covenant. *Middlemore v. Goodale*, Sir Wm. Jones, 406; Cro. Car. 503, 505. *See* Broom's *Parties to Actions*, 71.

They may at election join in covenant for non-payment of rent for lands, her inheritance leased during the coverture. *Aleberry v. Walby*, 1 Stra. 229. *Jones v. Meredith*, 2 Com. Rep. 674.

The husband cannot sue for arrears of rent accruing after the death of his wife, on a lease of her land by himself and wife under seal during coverture, in which the lessee covenanted with the husband and wife, and the heirs of the wife. If the lease be made according to the stat. 32 Hen. 8, c. 28, it continues during the term, notwithstanding the death of the wife; and though her heir is entitled to the rent, he cannot enter or eject. *Hill v. Saunders*, 2 Bing. 112.

[3] Tenants in common may join in an action of covenant for non-repair, as it is merely

3d. Partners.[1]

METCALFE v. RYCROFT, 6 M. & S. 75.

By indenture between J. M. and J. R. of the first part, B. R. and the defendant of the second part, and the several other persons whose hands and seals were set and subscribed, being creditors of the said J. M. and J. R., the defendant covenanted with the said several creditors, parties thereto, and each and every of them, and their and each and every of their several and respective partners in trade, executors, and administrators, that the said J. M., J. R., B. R., and the defendant, their heirs, &c. would on, &c. pay or cause to be paid to the said several creditors, parties thereto, or their respective partners in trade, executors, and administrators, 3*s.* 4*d.* in the pound, of the several and respective debts of them, the said creditors, parties thereto. The plaintiff carried on business in partnership with one J. M., and, together with his partner, were creditors of J. M. and J. R., and he executed the indenture in the name and firm of himself and partner. And he assigned for breach the defendant's refusal to pay him the said instalment.

One of two partners, who executes a deed of composition in the name of his firm, may alone maintain covenant for non-payment of an instalment, for the other partner, not being a party to the deed, cannot join.

In support of a demurrer it was submitted that where there is a joint interest in partners, in a covenant relating to the partnership, they must all join, although all do not execute the indenture.

Sed per Cur. No other than one who is a party to the deed can have a right to sue upon it. The right of suit is constituted by the deed; and as the hand and seal of the plaintiff's partner are not set thereto, he is not a party to the covenant.—Judgment for the plaintiff.

See 2 Stra. 1146; 7 T. R. 207; 10 East, 418; Gow on Partn. 83; *post*, Partners.

(c) In respect of Character, as Executor or Administrator, Assignee, &c.

CANHAM v. RUST, 8 Taunt. 227; 2 J. B. Moore, 164.

A term of years was granted by the defendant to one J. C., by way of mortgage, for securing the repayment of a sum of money and interest, with the usual proviso for redemption; and the said defendant covenanted with J. C., his executors, administrators, and assigns, for payment according to the proviso; but the money was not repaid at the time specified. J. C. then made his will, and bequeathed to the plaintiff the said sum of money, due and owing to the said J. C. from the defendant; and one A. C. and the plaintiff, who were appointed executors, proved the will; and A. C. assented to the bequest to the plaintiff. *Breach*, non-payment. The principal question before the court was as to the plaintiff's right to recover, he having sued in his own name, and not as executor.

A., possessed of a term of years by way of mortgage, bequeathed the *sum* due on it to the plaintiff, whom he appointed one of his executors; an action on the mortgagor's covenant was held not to be sustainable by the plaintiff in the character of assignee, because the covenant did not run with the land, and because it was

Per Cur. The leading principles as to the construction of covenants of this description, in which an assignee has or has not a right to sue, or be sued, are laid down in *Spencer's case*, and since established in *Bally v. Wells*, 3 Wils. 25, and *Gray v. Cuthbertson*, Selw. N. P. 2d ed. 509, 3d ed. 415. We think there is no ground for saying that the plaintiff might sue as assignee for the term vested in him and his co-executor. No other interest was transferred to him than the sum due to the testator from the defendant. This was a mere personal covenant, and as it is quite clear a personal covenant cannot be assigned, the executors alone could take advantage of it; besides, the covenant was broken in the lifetime of

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personal. *Kitchen v. Buckly*, 1 Lev. 109; T. Raym. 80.

One of five tenants in common brought covenant on a lease for rent, payable on the four most usual days of payment in the year; and the breach was that on the 24th day of June, 1824, a large sum of money, to wit, the sum of 21*l.* 15*s.* one-fifth part of the rent, for three quarters of a year of the term then elapsed, became due from the defendant to the plaintiff, and still was in arrear; and this was held good upon special demurrer. *Henniker v. Turner*, 4 B. & C. 157.

[1] They must sue and be sued jointly. 2

broken in the testator's lifetime, but that both executors should have joined, notwithstanding the assent of the co-executor to the legacy.[1]

the testator; and an assignee cannot support an action for breach before his own time.

See Cro. Eliz. 863; Com. Dig. Covenant, B. 3; id. Condition, O. 2; Vin. Ab. Covenant, K. 3, 10.

(E) *Holding to Bail in.*[2]

(F) *Payment of Money into Court.*[3]

(G) *Of the Pleadings.*

(*a*) *The Declaration.*

1*st. The Venue.*[4]

(*a*) *Local.*[5]

(*b*) *Transitory.*[6]

(*c*) *Where Mistake in, aided by* 16 *&* 17 *Car.* 2, *c.* 8.[7]

H. Black. 235. One partner cannot bind his co-partner by deed, unless he have express authority by deed for the purpose. 2 B. & P. 338; 7 T. R. 207, 209. *See* 8 D. & R. 102; 6 Mee. & W. 200.

[1] In covenant upon an indenture of lease against the surviving executrix of the lessee, the declaration stated that upon the death of T. P., the lessee, all his estate and interest in the premises came to and vested in the defendant and one S. P., which said defendant and S. P. were executrixes of the last will and testament of T. P., by reason whereof the defendant and S. P., as executrixes aforesaid, became and were possessed, &c.:— *Held*, a sufficient averment that the term vested in the defendant and S. P. as executrixes. *Acland v. Pring*, 3 Scott, N. R. 297; 2 Man. & G. 937. *Held*, also, that it was unnecessary to aver that the term had vested in the defendant and S. P. as executrixes, as the vesting of a term of the lessee's personal representatives, together with the liability of such personal representatives to be sued upon the covenants of the lease, is, in effect, a conclusion of law. (Id.)

It is necessary to sue an executor as *executor*, and not in his own name, for a breach on his testator's covenant to repair, even though the breach occur through the fault of the executor. *The Dean and Chapter of Bristol v. Guyse*, 1 Saund. 110.

In covenant against an administratrix, the plaintiff need not show by whom administration was granted (*Knight v. Green*, Lutw. 109); but plaintiff, administrator, ought to show it. (Id.)

[2] The right to bail in an action of covenant is regulated and governed precisely by the same rules as actions upon other contracts. *See* vol. i. p. 525.

[3] Formerly money could only be paid into court where the demand was for a liquidated sum, or the amount of it capable of being ascertained by mere computation (*see* 2 Salk. 596; 1 Wils. 75); but now, by 15 & 16 Vic. c. 76, s. 70, it may be paid in any action upon contract, whether under seal or not, or whether for liquidated damages or not, by way of compensation, the money must be pleaded. *See post*, Payment of Money into Court.

[4] In actions upon leases for a breach of covenant, where they are between the *original parties*, and founded on a privity of contract, as by a lessor against the lessee, or by the lessee against the lessor, the venue is transitory; and although the land be situated abroad, an action between those parties may be supported in England. Bac. Abr. Action, Local and Transitory (A.); 2 Stra. 776; 3 Lev. 354. Where an action is brought by the assignee of the reversion upon an express covenant contained in the lease, and running with the estate, it is made transitory by operation of 32 Hen. 8, c. 34; though in all other instances where the cause of action arises merely from a privity of estate, the venue is generally local, as by the assignee of the lessee against the lessor, or by the lessor against assignee of lessee.

[5] In an action of covenant by the assignee of a reversion against the assignee of the lessee for non-payment of rent, the venue is local, the privity of contract being destroyed by the assignment. *Barker v. Damer*, 3 Mod. 337; Salk. 80; S. C. Carth. 182; S. C. 1 Show. 191, *nom. Barker v. Dormer*. *Stevenson v. Lambard*, 2 East, 575.

[6] An action of covenant by an assignee of reversion against a lessee for non-payment of rent (*Thursby v. Plant*, 1 Saund. 237; 1 Lev. 259; 1 Sid. 401) may be brought in any county the plaintiff chooses. *Dixon v. Williams*, 2 Sid. 60, 118; 3 Salk. 239.

[7] Though covenant be local, yet after verdict it cannot be objected that the action was brought and tried in a wrong county, as the statute 16 & 17 Car. 2, c. 8, cures the defect. *The Bailiffs, &c. of Lichfield v. Slater*, Willes, 431. *Stirke v. Baines*, 1 Sid. 325; S. C. 3 Salk. 363; 1 Lev. 207. *The Mayor of London v. Cole & others*, 7 T. R. 583. S. P. *Crompton v. Stewart*, 1 Dowl. P. C. 567; 2 C. & J. 473. As on a trial in London on a feoffment of lands in Oxfordshire. *Adderly v.*

(*d*) *Where allowed to be changed.*[1]

ANON. 2 Chit. 419.

The venue may be changed under special circumstances.[2]

The venue was sought to be changed from Gloucester to Somersetshire. An application had been made for a view to inspect a partly-built house on the Gloucester side of Bristol.

Per Cur. Unless there is some preponderating circumstance, we shall not take away from the plaintiff the option which he has of laying the venue in any county he may think proper. If we did in this instance, we should have to distinguish every case on the ground of a view.

(*e*) *How stated in the Declaration.*[3]

2*d*. *Joinder of Counts.*[4]

3*d*. *Setting forth the Instrument declared on.*[5]

Wise, 2 Lev. 164. *Anon.* 3 Salk. 364. And in *Boyes v. Hewetson*, 7 C. & P. 127, it was decided, that where the objection does not appear upon the record, the judge at *nisi prius* in another county could not refuse to receive the evidence or nonsuit the plaintiff.

[1] The court having changed the venue in an action of covenant for payment of rent, refused to bring it back. *Arden v. Mornington*, 4 Tyr. Ex. 56.

In debt, on a covenant in a mortgage deed, with a count for goods sold in L., the county into which it was sought to remove the venue, motion refused, there being no affidavit of merits, or that it would be necessary to call witnesses resident in that county. *Anon.* 2 Tyr. 501.

[2] Such as the necessity of a view; in which case the venue was changed to the county where the land lay, notwithstanding the increase of expense to the plaintiff, from his witnesses residing in the county where the venue was laid. *Hodinott v. Cox*, 8 East, 268. So on a breach at Berwick of covenant, in a deed dated at York, the venue may be changed to the next adjoining English county. *Crispe v. the Mayor of Berwick*, 1 Vent. 58, 90; 1 Sid. 381, 462; T. Raym. 173; S. C. 1 Mod. 37; 1 Lev. 252.

[3] Formerly the venue in the margin varying from the description of the place in the declaration, would have been open to objection. *Jodderell v. Cowell*, Ca. temp. Hardw. 343. Not since R. 4, H. T. 1853.

An assignment is always supposed to be made on the lands assigned. *Huckle v. Wye*, Carth. 255.

[4] The rules as to joinder of counts is the same in this action as in other cases of contract. To a count in covenant charging the defendant, as executor, for a breach of covenant by his testator, as lessee, who had covenanted for himself, his executors and assigns, may be joined another count, charging that, after his proving his testator's will, the premises came by assignment to one D. A., against whom breaches were alleged, and concluding that so neither the testator, nor the defendant after his death, nor J. D. (an assignee of the premises), since the assignment to him, had kept the covenants, but had broken the same; and *plenè administravit* may be pleaded to both counts. *Wilson v. Wigg*, 10 East, 313.

It is not necessary to describe the deed of covenant to be *sub sigillo*. *Aldworth v. Hutchinson*, Lutw. 115; Nels. Lutw. 98. *Atkinson v. Coatsworth*, 8 Mod. 33; 1 Stra. 512. The deed should be stated according to its legal operation, as it was originally made, and it has been observed that the contract may be stated without using a word in the deed, except the names of the parties and the sums. 1 Marsh. 216. And where a title by conveyance, in which are the words give, grant, release, confirm, bargain, sell, &c., is pleaded, the party should rely on one of those words, or at least should only adopt such of them as have the same operation. 2 Saund. 96, b, n. 2; Co. Litt. 49, a, n. 1; Willes, 319; 6 East, 105. So if the tenant for life and remainder-man join in a lease, it must not be described as the lease of both, but as the lease of the tenant for life, and the confirmation of the remainder-man. 6 Co. 14, b.; 1 T. R. 94; 4 Bac. Ab. 127. Any matter which qualifies the contract must be stated, or the plaintiff will be non-suited on the plea of *non est factum*, unless the judge at the trial allow an amendment. *See* vol. i. p. 336; 11 East, 633; 1 Chit. Plead. 3d edit. 353–4; 2 Brod. & B. 395.

A statement in the declaration, "that A., B., and C., demised by indenture," will be construed to mean a sealing and delivery by them. *Wilson v. Woolfryes*, 6 M. & S. 341.

[5] A declaration in covenant stated that by a deed made between W. B. of the first part, and G. D. and S. A. of the second part, P. V. and W. B. of the third part, and the Thames Haven Dock and Railway Company of the fourth part; and after reciting that J. and V., on behalf of the company, agreed to purchase premises, it was witnessed that W. B. agreed with the company, the defendants, to sell to them certain messuages and lands, and that W. B. would deduce a good title to the hereditaments, &c., and that W. B. would execute a proper conveyance of the hereditaments to the company; and the

company agreed with W. B. and his assigns to pay, &c. *Averment*, that W. B. became bankrupt, and the plaintiffs became his assignees; that both he and they were ready and willing to deduce a good title to the hereditaments; that W. B. and his heirs and assigns were ready and willing, on payment by the company, to execute a proper conveyance of the hereditaments to the company, and would have deduced a good title, and would have executed a proper conveyance, but that the company discharged him and the plaintiffs from deducing such title and executing such conveyance. *Breach*, that the company would not prepare such proper conveyance for execution or pay:—*Held*, on special demurrer, that the declaration was not bad in omitting to allege that the deed was sealed with the seal of the defendants. *Brymer v. Thames Haven Dock and Railway Co.* 2 Ex. 459; 18 L. J. Ex. 110; S. L. in error; 5 Ex. 696; S. P. *Doogood v. Rose*, 9 C. B. 132; 19 L. J. C. P. 246. *Cort v. Ambergate Railway Co.* 17 Q. B. 127; 20 L. J. Q. B. 460.

A declaration on a covenant by a purchaser, to pay annuities and indemnify the plaintiff—breach for non-payment of the annuities is sufficient, without averring plaintiff had been damnified. *Saward v. Anstey*, 2 Bing. 519. So, a declaration by one of five tenants in common. *Breach*, "that on &c., one-fifth part of the rent for &c., then elapsed, became due to the plaintiff," is sufficient. *Henniker v. Turner*, 4 B. & C. 157. So, a general averment in a declaration for eviction, that the "evictor was lawfully and rightfully entitled," is sufficient. *Milner v. Horton*, 1 M'Clel. & Y. 647. But upon an eviction the declaration must show that the party did not come in under the plaintiff. *Brooks v. Humphreys*, 7 Dowl. P. C. 118; 5 Bing. N. S. 55; 6 Scott, 756. And a declaration by the heir, stating that he was "cousin and heir," is insufficient; it must show how. *Ledgbird v. Judd*, 7 D. & R. 517. But it is cured by verdict. *Hams v. Beavan*, 4 Bing. 646.

And a declaration for breach of covenant, whereby an annuity became impeached:—*Held*, that the declaration must state the acts by which the security was assoiled. *Pitt v. Williams*, 4 Nev. & M. 412. So, where a surety covenants to pay rent if in arrear three quarters, forty days after demand, the declaration must aver a demand, and that the forty days have expired. *Sicklemore v. Thissleton*, 6 M. & S. 9.

Under a covenant to appear, in order to insure, and not do any act to avoid the policy. *Breach*, that the defendant went abroad:—*Held*, that the declaration was bad for not showing he had notice of the insurance being effected. *Vyse v. Wakefield*, 8 Dowl. P. C. 377; 6 Mee. & W. 442.

The word "lands" will be construed into land. *Birch v. Gibbs*, 6 M. & S. 115.

Where, in covenant for non-repairing, the declaration set out the demise in the lease of certain premises, with the appurtenances (except as therein excepted), *habendum* with a similar exception, for the term of twelve years, except the last day thereof, but in the lease produced the only exception was the last-recited one, applying to the last day of the term:—*Held*, not to be a material variance. *Williams v. Wayes*, 9 Price, 642.

As the word covenant imports a deed, a defect insufficiently showing it to be such in a declaration is cured by pleading over. *Dodd v. Atkinson*, Ca. temp. Hardw. 342. But a declaration in covenant upon *quoddam scriptum factum*, &c., is bad, without saying *sigillo suo sigillat.*; nor will the defect be aided by a profert, although the instrument on production prove to be a deed. *More v. Jones*, 1 Barnard, 61; 2 Stra. 814; 2 Ld. Raym. 1536. Yet where it was *per quoddam scriptum, per quod testatum existit*, it was held good, although the *per quod* was surplusage, the court conceiving the sense to be the same. *Stephenson v. Stephenson*, 1 Sid. 375; 2 Keb. 400.

One may declare in covenant that the instrument purporting to be made and concluded on such a day was in fact made and concluded on a day subsequent. *Hall v. Cazenove*, 4 East, 477; S. C. 1 Smith, 272.

Profert in curiam of the deed is abolished by s. 55 of 15 & 16 Vic. c. 76.

[1] The whole consideration of a deed need not be set out in the declaration. *Swallow v. Beaumont*, 2 B. & A. 765.

The declaration usually proceeds immediately from the commencement to the statement of the defendant's contract, without any intermediate inducement or statement of the consideration upon which the contract was founded (Com. Dig. Pleader, 2 W. 9); for, in general, the circumstances under which the deed was made are immaterial, and a consideration is seldom essential, or at least is to be presumed. Plowd. 308; 7 T. R. 477; 4 East, 200; 1 Fonbl. 347. It is principally on this account that the declaration in debt or covenant on a specialty differs from that in *assumpsit*. 1 Chit. Plead. 348, 3d edit.

In declaring in covenant, it is sufficient to set out certain premises, without naming them, were demised, subject to such a proviso, setting out the substance and the breach (*Dundass v. Lord Weymouth*, Cowp. 665); and the court ordered a reference to the master to strike out the superfluous matter with costs. *Price v. Fletcher*, Cowp. 727.

If a deed contains a covenant with a *proviso*, the plaintiff in his declaration need not set forth more than the covenant. *Elliott v. Blake*, 1 Lev. 88; T. Raym. 65.

A relative shall be taken to refer to the last antecedent. *Hill v. Dade*, 1 Show. 72.

In covenant against the assignee of an

5th. Of the Averments necessary.[1]

assignee, the intermediate assignments need not be specially set forth (*Lovelock v. Sorrel*, 8 Mod. 72. *Smith v. Simonds*, Comb. 64); But it ought to be shown that the defendant was assignee of the estate of the lessee. *Huckle v. Wye*, Carth. 255.

In an action instituted by a person who was not a party to the original contract, as where it is brought by the assignee of a term, the plaintiff must describe in his declaration all the intermediate assignments down to himself; for he being privy to them is not allowed to plead generally, that the lessee's estate and interest came to him, or to some other person under whom he derives title, by assignment (1 Saund. 112, n. 3); but where the action is brought against the assignee of a term, such general mode of pleading will be regular, for the plaintiff is presumed to be ignorant of the title of the defendant, and is therefore unable to set it out with minuteness or particularity. Cro. Eliz. 377; Com. Landl. and Ten. 417.

[1] Where the covenant was to pay so much beyond the profits of an office, which, on an account, should amount to so much clear; the amount of the profits should be averred in the declaration, as well as the time and place of taking the account. *Buckner v. Rolestone*, 1 Sid. 304; 2 Keb. 92. So on a covenant to indemnify B., who advanced money on certain bills of exchange, where the fact of the bills having been drawn and become due, and the fact of payment, constitute the gist of the action, they must be alleged with time and place. *Denison v. Richardson*, 14 East, 291.

On a covenant to pay for coals, shipped on the river Tyne, a breach that they were shipped at Tinmouth must show that Tinmouth is on the Tyne. *Toddard v. Middleton*, 5 Mod. 352.

If in covenant a breach is assigned for non-payment of rent, and is followed by an allegation that before the exhibiting of the bill, to wit, on, &c. (naming a day prior to the date of the lease), so much was, and still is due; on general demurrer such allegation will not hurt, as the day being impossible, might be rejected as surplusage. *Buckley v. Kenyon*, 10 East, 139.

Declaration in covenant stated that, by an indenture of assignment of certain leasehold premises, between the plaintiff, the defendant's testator, and W., the testator, for himself, his executors, &c., covenanted with the plaintiff to pay to W. the sum of 1200*l.* and interest. By the indenture, as set out in the plea on oyer, it appeared that the plaintiff had mortgaged the premises to W., with a proviso that if the plaintiff, his executors, &c., six months after demand in writing, should pay the 1200*l.* to W., W. would re-convey; that the assignment by the plaintiff to the testator was subject to the above indenture of mortgage to W., and to the payment to him of the said sum of 1200*l.* There was then a general covenant for payment by the testator to W. of the sum of 1200*l.* The plea then alleged that no demand in writing of payment of the sum of 1200*l.* was made upon the plaintiff: — *Held*, on demurrer to the plea, that the declaration was bad, since, as no demand of payment had been made by W. on the plaintiff, pursuant to the proviso the money was not due, and the defendant was not liable on his covenant. *Trott v. Smith*, 10 Mee. & W. 453; 12 L. J. Ex. (N. S.) 186.

On a covenant to pay, "so as notice be given in writing," the declaration must expressly state that fact. *Harwood & Binks v. Hilliard*, 2 Mod. 268.

It is frequently necessary, in special covenants, to aver that the defendant had notice of some fact or facts previously stated; and a great variety of the instances where such averment is necessary are collected in Com. Dig. tit. Pleader, C. 73–75; Vin. Ab. Notice; Hardr. 42; 5 T. R. 621, 624; and from these it appears that when the matter alleged in the pleading is to be considered as lying more properly in the knowledge of the plaintiff than of the defendant, then the declaration ought to state that the defendant had notice thereof; as, where the defendant promised to give the plaintiff as much for a commodity as another person had given, or should give him for the like, or to pay the plaintiff what damages he had sustained by a battery, or to the plaintiff his costs of suit, &c. 2 Saund. 63, a. n. 4; Cro. Jac. 432; Hardr. 42; Com. Dig. tit. Pleader, C. 73; 5 T. R. 621, 624; 11 Mod. 48. But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred. 1 Saund. 117, n. 2; 2 Saund. 62, a. n. 4; Freem. Rep. 285.

In order to maintain action on a covenant to transfer South-sea stock, at the S. S. House, at the usual hours, the plaintiff must aver what are the usual hours. *Bowles v. Markwith*, Fitzgib. 61. And must also aver tender and refusal, or that he waited till the last time of the day on which a transfer could be made, namely, till the closing of the bank books. *Bordenave v. Gregory*, 5 East, 106; 1 Smith, 306. *Shales v. Seignoret*, 12 Mod. 248; 1 Ld. Raym. 440. S. P. *Lancashire v. Killingworth*, 12 Mod. 529; 2 Salk. 623; 3 id. 342; 1 Ld. Raym. 686. *Lock v. Wright*, 8 Mod. 40; 1 Stra. 569. *Wivell v. Stapleton*, 8 Mod. 68; 1 Stra. 615. S. P. *Blackwell v. Nash*, 8 Mod. 105. *Warren v. Consett*, 8 Mod. 107, 323, 382; 2 Stra. 778. *Mordant v. Small*, 8 Mod. 218. *Shelburne v. Stapleton*, 8 Mod. 292; S. C. 1 Stra. 615.

In covenant for non-payment of money, no allegation of demand is necessary, as it is in debt. *Anon.* Sty. 31. Thus a demand is not necessary to support an action for the penalty on a covenant to pay 20*l.* on such a day, and in default thereof to pay 40*l.* *Bradcat v. Tower*, 1 Mod. 89. Or on a lease

BEANY v. TURNER, 1 Lev. 293; 1 Mod. 61.

On mutual covenants no averment of performance is necessary.

Per Cur. Where there are mutual promises no averment of performance is necessary, and therefore an ill averment of that which needs no averment shall not vitiate. *See* 2 H. Black. 579.

6th. Title.

(a) In Suit by Lessor v. Lessee.

ALEBERRY v. WALBY, 1 Stra. 229.

In covenant on his own demise, the plaintiff need not set out a title.[1]

Error of a judgment in C. P. in an action of covenant brought by a man and his wife, and E. F., upon a lease of lands of the inheritance of the wife and E. F. co-heirs, and the breach assigned in non-payment of rent. An exception was made to the manner in which the plaintiffs had deduced their title. They said that one J. S. was seised in fee of the demised premises, and that upon his death the same descended to E. F. and the wife, as cousins and heirs. It was urged that the court could not take a man and a woman without more showing to be co-heirs, and that when the plaintiff undertook to set out a title and failed in doing so, it was said there was no room in that case for intendments.

Sed per Cur. The introduction by setting out the descent is nothing to the purpose here, where they declare upon their own demise; and, therefore, there can be nothing in that exception.—Judgment for the plaintiff affirmed. *See* 1 Saund. 233, n. 2.

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yielding and paying 10*l.* at Michaelmas, if demanded, or within ten days after. *Norris v. Elsworth*, Freem. 463.

Where covenants are dependent, the plaintiff ought to aver such performance. *Heard v. Wadham*, 1 East, 619. Thus on a covenant to repair, A. finding timber; to enable A. to bring an action he must aver in his declaration that he was always ready to find the timber. *Thomas v. Cadwallader*, Willes, 496. And in a declaration on a covenant to deliver coals on board such vessels as the plaintiff should appoint, the plaintiff must aver that he appointed the vessels, &c. *Griffith v. Mansell*, Freem. 93.

No averment of performance is necessary on mutual promises. Where the respective acts to be done by the plaintiff and defendant are mutual, and are to be performed at the same time, the plaintiff should aver his readiness to perform his part, and either state that the defendant neglected to attend when necessary, or refused to perform his part, or discharged the plaintiff from his performance. Dougl. 684; 1 East, 203; 2 Saund. 352, n. 3. *Beany v. Turner, supra* in text. A plea, therefore, to a declaration in an action on mutual covenants, that the plaintiff did not perform his part, was deemed bad. *Smith v. Cudworth*, 1 Show. 390; Holt, 547.

Where the covenant is to do an act on request, request ought to be averred (*Lambert v. Lane*, Lutw. 112); but in declaring on a covenant to deliver up premises at the end of the term, it is not necessary to aver a request: the defendant may plead that he was ready, but that nobody was there to receive it. *Norris v. Elsworth*, Freem. 462. Nor is it necessary where the covenants are mutual. *Wilkinson v. Meyer*, 8 Mod. 173; 1 Stra. 585; 2 Ld. Raym. 1350.

Whenever it is essential to the cause of action that the plaintiff should have requested the defendant to perform his contract, such request must be stated in the declaration and proved. Com. Dig. Plead. C. 69–73; 1 Saund. 33, n. 2; 1 Stra. 88; 2 Vent. 75; 3 B. & P. 438. It has been observed, that if it had been held that a request were essential in all cases, many vexatious actions might be avoided; but there are a variety of instances in which it is settled that no request is necessary anterior to the action, and consequently need not be stated in the pleading. 1 B. & P. 59, 60; Cro. Eliz. 548; Chit. on Bills, 2d edit. 183, 184. Thus, where the declaration is upon a contract to pay a precedent debt, as in the case of the common counts for goods sold, work and labour, money lent, &c., no request need be stated or proved. 1 Saund. 33, and id. n. 2; Bull. N. P. 151. But when, by the express or implied terms of the covenant, it is incumbent on the plaintiff, before the commencement of his action, to request the defendant to perform his contract, such request, being as it were a condition precedent, must be averred. Com. Dig. Plead. C. 69; 2 H. Black, 131; 1 Saund. 32, 33; 5 T. R. 409; 3 Bulst. 297.

[1] It was stipulated by one of the conditions of sale of a copyhold estate by auction, that the purchaser should pay down a deposit, and sign an agreement for the payment of the remainder of his purchase-money on or before the 25th December then next, on having a good title. In an action brought by the vendor against the purchaser

(*b*) *In Suit by Executor or Administrator of Lessor v. Lessee.*[1]

NORRIS v. ELSWORTH, Freem. 463.

Parties suing under a derivative title should disclose it in the declaration.

An objection was made that the plaintiff had brought this action, as administrator of the lessor, for rent, part whereof did grow due after the death of the lessor, and so he had not entitled himself to it, for he ought to have set forth that the lessor was possessed of a term for years, and so did demise part of the term; but there being no such allegation, it should be intended that the lessor was seised in fee, and then the rent accruing due after the lessor's death belonged to the heir, and not to the executor.

The court seemed to incline that this objection could not be answered, but, however, gave the plaintiff a day to answer it. *See* 2 Chit. Rep. 461; 2 Went. Plead. 456, 457.

(*c*) *In Suit by Assignee of Lessor v. Lessee.*[2]

(*d*) „ *Lessor v. Assignee.*[3]

(*e*) „ *Lessee v. Under-Lessee.*[4]

(*f*) „ *Husband and Wife.*[5]

(*g*) „ *Joint-Tenants.*[6]

1. *Lessee's Entry and Eviction.*[7]

2. *By whom Eviction made.*[8]

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for non-performance of the condition, the court held the declaration bad, because the plaintiff had not shown what title he had to the estate; for whatever his interest was, it ought to have been specially set forth. *Phillips v. Fielding*, 2 H. Black. 123.

[1] A declaration in covenant by the executor or administrator of a termor for breach after the termor's death, should state the termor's interest and title in the premises (*Mackay v. Mackreth*, 2 Chit. 461), and that his testator or intestate had a chattel interest. *Norris v. Elsworth*, *supra* in text. And this is necessary, in order that it may appear that the lessor had such an estate in the reversion as might be legally vested in the plaintiff, in the character in which he sues (1 Saund. 233, n. 2; 1 Stra. 230; 7 T. R. 538; Com. Dig. Plead. C. 36; Gilb. Debt. 410); and this even where the estate of the plaintiff is derived from the king or a corporation. 1 Saund. 187, n. 1; and see 1 Chit. Plead. 3d. edit. 349, 350.

[2] In covenant against the lessee by the assignee of the lessor for non-payment of rent, an allegation in the declaration that the lessor was possessed for the residue of a term of twenty-two years, commencing on, &c., is material and traversable. *Carvick v. Blagrave*, 4 J. B. Moore, 303; 1 B. & B. 531.

[3] If the declaration sets out an indenture from A. to C., reciting a demise of the premises to A. by J. S., and it appears on the declaration that J. S. ejected C., he will be held, particularly after verdict, to have had a title to the premises, although there is no express allegation of the fact. *Campbell v. Lewis*, 3 B. & A. 393; 3 J. B. Moore, 35; 8 Taunt. 715.

[4] Lessee bringing covenant against his under-lessee need not show out of what estate his own lease was made. *Gold v. Barnsly*, Carter, 30.

[5] If husband declares in covenant that he is seised in his demesne, as of *freehold*, in right of his wife, it is bad on special demurrer; he ought to declare that he and his wife, in right of his wife, are seised in their demesne, as of *fee*, &c. *Polybank v. Hawkins*, Dougl. 329.

[6] An estate was conveyed to A. and B., and the heirs of B., in trust for A. and his heirs; A. alone brought covenant against the lessee, and in the declaration stated himself to be thereby seised in his demesne as of fee: this was held bad on general demurrer, as the estate being conveyed in joint tenancy, A. should have averred the death of B. *Scott v. Godwin*, 1 B. & P. 67.

[7] The plaintiff, in covenant for quiet enjoyment, need not allege his entry and an eviction; it is sufficient if he show a good title in another. *Cloake v. Hooper*, Freem. 121.

[8] But in an action by a lessee against his lessor for breach, whereby lessee's assignee was evicted, plaintiff must show by whom, and a mere statement that A. B. was seised in fee, and that the assignee was evicted generally, is not sufficient. *Fraser v. Skey*, 2 Chit. Rep. 646.

In covenant not to cut down more timber than sufficient for reparations, a breach that he cut down timber to the amount of 10*l.*, and converted it to his own use, is bad, for it ought to have been averred that it was more than necessary for reparations (*Wingfield v. Sherwood*, Sty. 5). But on a covenant to repair, being allowed to cut sufficient

timber, the plaintiff need not aver that there was enough timber; if there was not, the defendant must show it. *Chesterfield v. Bolton*, 2 Com. 626.

[1] The breach of the contract being essential to the cause of action, must, in all cases, be stated in the declaration (Com. Dig. Pl. C. 44, &c.); and it must obviously be governed by the nature of the stipulation. It should be assigned in the words of the contract, either negatively or affirmatively, or in words which are co-extensive with the import and effect of it (id.; and id. 2 Ves. 2; 2 Saund. 181, b, c; 1 Price, 109: but *see* 6 Taunt. 45, 47): therefore, in debt or bond, conditioned for the payment of an annual sum to the wife of the obligor, a breach assigned in non-payment of the annual sum to the obligee is insufficient (6 Taunt. 140; 1 Marsh. 495). Where the contract was specific to do or forbear some particular act, it is in general sufficient to assign the breach in the words of the contract: thus, if the contract were to show a sufficient record, it is enough to allege that the defendant did not show a sufficient record, though issue cannot be joined upon it, because sufficiency of matter of record cannot be tried by a jury; but the defendant on such breach assigned, may plead that he showed such a record, and upon demurrer the court will judge whether it be sufficient (Yelv. 39; Com. Dig. Pl. C. 45; 1 Price, 109: but *see* 6 Taunt. 45, 47). So, a breach in the words of the covenant for not repairing, without enumerating the particular dilapidations, will suffice. Lutw. 329; *see* also 1 Chit. Pl. 325, 326, 3d edit.

Covenant upon an indenture, whereby the defendant demised to the plaintiffs, for ten years, a brewery at S., "and, also, the exclusive or such other privileges as the defendant then enjoyed, of supplying ale," &c. to certain public-houses, "then the property of the defendant, or then under his control; that is to say, the Punch Bowl," &c. The declaration averred, that at the time of making the indenture the defendant was the landlord and owner of the Punch Bowl, and in the occupation thereof, and that afterwards he demised it to one G., who covenanted with the defendant to purchase all the ale, &c., consumed on the premises, from the plaintiff. *Breach*, that G., during his tenancy of the Punch Bowl, did not purchase all the ale, &c., from the plaintiff, but purchased it from the defendant and others:—*Held*, that this breach was not well assigned, and, also, that the declaration should have shown what privilege the defendant possessed. *Hinde v. Gray*, 1 Man. & G. 195; 1 Scott, N. R. 123; 4 Jur. 392.

A declaration in covenant stated, that by a deed between the defendant of the first part, one J. D. of the second part, and the plaintiff of the third part, the plaintiff covenanted with the defendant that J. D. should, during the term of five years from the date of the deed, serve, abide, and continue with the defendant as his assistant in the art of a surgeon-dentist, and perform such service as the defendant should order to be done, &c. in the way of his art, with stipulations for working nine hours per day; and that the defendant, in consideration of the services to be performed by J. D., covenanted with the plaintiff that he, the defendant, during the said term of five years (in case J. D. performed his part of the agreement, and particularly the work of nine hours per day), would pay to J. D. 35*s.* weekly for the first year of the term, 2*l.* weekly during the two and three years of the term, 2*l.* 2*s.* weekly during the fourth and fifth years of the term, for wages and compensation for the services aforesaid. The declaration then averred performance of all covenants on the part of J. D., and alleged as a breach that the defendant would not permit J. D. to continue in his service, but dismissed him:—*Held*, in arrest of judgment, that the breach was ill-assigned, as there was no implied covenant on the part of the defendant to retain J. D. in his service during the five years. *Dunn v. Sayles*, 13 L. J. Q. B. (N. S.) 159; 8 Jur. 358; 1 D. & M. 579; 5 Q. B. 671.

A tenant's allowing a footpath to be made across a part of demised premises, is no breach of a covenant to occupy the premises in a proper manner. *Doe d. Worcester (Trustees) v. Rowlands*, 9 Car. & P. 734: *Coleridge*.

It was covenanted and agreed between A. and B. that he should manufacture cement for the use of B., of a specified quality; that B. should pay A. a certain weekly sum for two years from the agreement, and another weekly sum for one year after; and should receive A. into partnership in the business of manufacturing cement at the end of three years, and that A. should instruct B. in the art of manufacturing cement:—*Held*, in action brought by A., assigning as a breach of this agreement that B. wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years, and, therefore, the contract could not be sustained. *Aspdin v. Austin*, 5 Q. B. 671; 1 Dav. & M. 515.

The declaration stated that, by indenture, the plaintiff demised a dwelling-house and premises to the defendant, and the defendant thereby covenanted that he would expend 100*l.* in substantial improvements of, and additions to the dwelling-house, under the direction and with the approbation of some competent surveyor, to be named by and on the part of the plaintiff. *Breach*, that the defendant did not expend 100*l.* on substantial improvements and additions to

Bascawin v. Cook, 1 Mod. 223; 2 id. 138. Lucy v. Leviston, Freem. 103. Procter v. Burdet, 3 Mod. 69; 3 Lev. 170. Plomer v. Plaisted, 2 Show. 472. Lee v. Johnson, Lutw. 115. Brigstock v. Stanion, 1 Ld. Raym. 106.

Per Cur. An assignment of a breach according to the words of the covenant is good; and if anything be done amounting to a performance, the other side must plead it. Assignment of a breach in the words of the covenant is sufficient.[1]

See 9 Co. 60; Yelv. 30, 40; 2 Saund. 181, c. n.; Com. Dig. Pl. C. 45, 46; Cro. Jac. 436; 1 Stra. 208; 1 Salk. 139; 1 Ld. Raym. 478; Holt, 176.

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the said dwelling-house, under the direction or with the approbation of a competent surveyor, to be named by and on the part of the plaintiff, but neglected and refused so to do, although the plaintiff was always ready and willing to appoint a competent surveyor to approve of such substantial improvements and additions: — *Held*, that the breach was bad, for that the appointment of a surveyor was a condition precedent to the defendant's liability to expend the 100*l*. *Coombe v. Green*, 11 Mee. & W. 480; 12 L. J. Ex. (N. S.) 291; 2 Dowl. N. S. 1023, Ex.

A declaration that the defendant had assigned his practice of a surgeon and apothecary to the plaintiff, and covenanted that he would not, directly or indirectly, by himself or in co-partnership with any person, carry on the practice of a surgeon or apothecary within a certain distance, under a penalty of 500*l*.; and stated as a breach the practising of the defendant within that distance. The defendant pleaded that he did not carry on the business of a surgeon, &c. *modo et formâ*. It appeared that on several occasions he had acted as a surgeon and apothecary within the prescribed distance, but that he had done so with the knowledge and consent of the plaintiff, and for the purpose of assisting him in his business: — *Held*, that the defendant's conduct did not amount to a breach of the covenant. *Rawlinson v. Clarke*, 14 L. J. (N. S.) Ex. 364.

A lease of the Opera-house contained covenants on the part of the lessee, first, not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year: — *Held*, that this was not a breach of the covenant. *Croft v. Lumley*, 6 H. L. Cas. 672; 4 Jur. N. S. 903; 27 L. J. Q. B. 321. And, secondly, not to grant, convey, assign, dispose of, &c. the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st of August, 1852, he made another lease of the same boxes to a different person, with this *habendum*: "From the first of February now next ensuing, or from such subsequent day during the year upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day:" — *Held*, that this was not a breach of the covenant. (Id.) Third. "Not to charge or incumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges, or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts he granted warrants of attorney, one of which was to secure payment of bills not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered, and judgments were signed against him on those warrants of attorney, and upon judge's orders, and registered: — *Held*, that no breach of this covenant had been committed. (Id.)

A covenant to permit, &c. a breach *quòd non permissit* alone is bad, as being too general (*Target v. Lloyd*, 2 Vent. 277). So is a breach assigned that four payments are due, without showing which, when six are in arrear (*Piltarfe v. Darby*, 1 Show. 8). Thus, also, on a covenant to deliver beer, and to account for monies received from customers under covenantor's charge, is a breach that he did not account for such money as he had received on such a day, being too general (*Arnold v. Floyd*, Sty. 473, 476). So, likewise, on a covenant to pay so much *per* ton is a breach, in not paying for so many tons and one hogshead (*Rea v. Burnis*, 2 Lev. 124; id. 117). In like manner, on a covenant not to assign without license, a breach assigned in making a lease, without saying "without license," is bad. *Copping v. Slaymaker*, 2 Show. 248.

Semb. Where A. covenants not to do anything to hinder the plaintiff's receiving debts, on an assignment of them to him, a breach, that the defendant released a debt to J. S., but did not say how, is bad. *Howson v. Denham*, 2 Show. 416.

On a conveyance of a messuage and free ingress to a well, and covenant that vendor is seised in fee, a breach that he was not seised is not properly assigned, as the covenant did not extend to the well. *Butterfield v. Marshall*, 1 Nels. Lutw. 8vo. ed. 232.

A declaration assigning an outlawry as a breach of covenant ought to show in what king's reign the outlawry was. *Fox v. Wilbraham*, 1 Ld. Raym. 668.

A factor, covenanting to account for goods, or the net produce of them, is not liable to an action of covenant assigning as a breach that he received so many rupees, and converted them to his own use. *Sheppherd v. Maidstone*, 10 Mod. 144.

[1] It is unjudicious unnecessarily to narrow

the breach. Thus, where the breach of covenant was assigned that the defendant had not used a farm in a husband-like manner, but, on the contrary, had committed waste, it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusband-like manner if such misconduct did not amount to waste, though, on the former words of the breach, such evidence would have been admissible (3 T. R. 307, 637); and no inconvenience can result from laying the breach as extensively as the contract, for the plaintiff may recover, though he only prove part of the breach as laid (5 Taunt. 27; 6 East, 437; 4 M. & S. 349). In assigning the breach of a covenant not to release a debt, or not to alien without license, it must be averred that the release or alienation was without license, though the burthen of proof of license would be on the defendant. Sir T. Jones, 229; Skin. 120; Vin. Abr. Covenant (L. a), pl. 43; *see* 1 Chit. Pl. 3 ed. 329.

A breach assigned according to the intent of the parties to the covenant is good. *Griffith v. Goodhand*, T. Jon. 191; T. Raym. 464. It ought, however, to be certain and positive. *Dummer v. Birch*, 1 Com. 146.

A breach is well assigned in the words of the covenant, although the covenant be in the disjunctive. *Rawlins v. Vincent*, Carth. 124. If the covenant be in the disjunctive, the breach ought to be assigned that the defendant did not do the one act or the other; as, on a promise to deliver a horse by a particular day, or pay a sum of money. 1 Sid. 440, 447; Hardr. 307; Com. Dig. Pleader, C.; 1 Stra. 231. So a breach that two did not render or pay, when a render by one would suffice, is insufficient (4 M. & S. 33); and if a covenant be that the defendant and his executors and his assigns should repair, a breach for not repairing ought not to be in the conjunctive. Cro. Eliz. 348; 1 Stra. 228.

And on a covenant to convey to the plaintiff or his assigns, a breach that he had not conveyed to the plaintiff, without adding *or to his assigns*, is good. *Smith v. Sharp*, 5 Mod. 133; 1 Salk. 139. So in covenant to pay, or cause to be paid, to them or either of them, a breach that the defendant did not pay them is sufficient; for if he paid, or caused to be paid either, it might be pleaded in discharge. *Aleberry v. Walby*, 1 Stra. 229.

A. covenanted that he or his assigns should, &c., an action assigning as a breach that he did not, &c. is good, without naming his assigns (*Guise v. Ellis*, 11 Mod. 313; 1 Stra. 228); and on a grant to A. and B., their executors, administrators, and assigns, reserving rent, an action of covenant, alleging for breach that B., the survivor, had not paid, without naming his assigns, is good. *Mayor of London v. Tench*, 7 Mod. 173.

Where the covenant is to pay one of two things, and a breach is assigned that he did not pay either, the plaintiff need not allege that he made his election: but if he declare for one of the two, he must allege his election. *Ashworth v. Lord*, Sayer, 232.

A breach that J. S. disturbed the plaintiff in a way, without showing that J. S. had title, was held bad (*Holms v. Seller*, 3 Lev. 305); and in covenant on warranty in a fine, *sur concessit*, a breach that J. S., having lawful title, entered, &c., was held bad, because it did not show what that title was (*Wootton v. Heal*, 1 Mod. 66; 2 Saund. 177; 1 Lev. 301; 1 Sid. 466. *Norman v. Foster*, 1 Mod. 101. *Mosse v. Archer*, 3 Mod. 135). Nor is the defect cured by a verdict for the plaintiff, in an issue on a plea *protesting* that A. had not any lawful title, and *affirming* that he did not disturb the plaintiff; for it ought to be shown that the title of the evictor accrued before the assignment, or that he claimed through the covenantor (*Noble v. King*, 1 H. Black. 34), and not under the covenantee. *Norman v. Foster*, *supra*.

In assigning a breach, however, for quiet enjoyment, it is sufficient to allege that A., at the time of making the indenture, had lawful right and title, and evicted the plaintiff, without showing what title A. had, or that the plaintiff was evicted by legal process (*Foster v. Pierson*, 4 Term Rep. 617. *Hodgson v. East India Co.* 8 id. 278. *Proctor v. Newton*, 2 Lev. 37; 1 Vent. 184). It is also sufficient to state that A. entered by *prior* title, without showing what title (*Buckly v. Williams*, 3 Lev. 325): and on a covenant against all persons claiming, or pretending to claim, &c., a breach that A., having, or pretending to have, a claim time out of mind, entered, is good (*Chaplain v. Southgate*, 10 Mod. 384; 1 Com. 230). But where the lessor's covenant was for quiet enjoyment against himself, or any persons claiming under him, or by his consent, means, or procurement, a breach that B., *claiming title* from the lessor, entered, is bad, for he might claim, though he had no title under him (*Eeles v. Lambert*, Sty. 37, 54, 73). Yet in an action against the lessor himself on his covenant for quiet enjoyment against the *lawful* let, suit, &c., of himself, his heirs, &c., no express allegation that he entered, claiming title, is necessary, if the act complained of be clearly an assertion of right. *Lloyd v. Tomkies*, 1 T. R. 671. *Crosse v. Young*, 2 Show. 425.

Covenant to repair all pales except those on the west side, a breach in not repairing the pales *contra formam*, &c., without showing what pales, is bad on demurrer, but aided by verdict. *Anon.* T. Jon. 125. The insufficiency of a breach will in general be aided by a verdict, by the common law intendment, that it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given the verdict, without sufficient proof of the breach of contract (Sir T. Jones, 125; 1 Salk. 140; 4 Mod. 189; Skin. 344; 5 East, 270, 271; Com. Dig. Pleader, C. 48; 1 Saund. 228, n. 1). So is a general breach of *non performavit agreeamentum*. *Knight v. Keach*, Comb. 204; 4 Mod. 181; Holt, 53; Skin. 344.

In covenant, if a breach assigned relate to three covenants, and conclude *fregit conventionem*, in the singular number, it is

HAMMOND v. ROGERS, 11 Mod. 314.

In articles dated the 30th of September, 1718, the defendant covenanted not to use a certain trade within a mile for twenty years next after the date; and for breach it was assigned that, *postea et ante finem termini predict., viz. primo die Maii*, 1718, he set up within a mile. *Plea*, that he did not, &c. *modo et formâ.*

Per Cur. If the *scilicet* is repugnant to the *postea*, it is always rejected, and the *postea* stands. *Postea* must always relate to a time before-mentioned. The day of the date is the whole day; and then *postea* must be the day after.—Judgment for the plaintiff.

(*b*) *The several Pleas in General.* *See* particular instances, *post*, 518.

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good. *Aster v. Mazeen*, 2 Mod. 311.

In a breach, the words *idem Georgius in facto dicit*, instead of *eadem Anna* (who was his administratrix), were held immaterial, the other parts being right. *Rea v. Barnes*, 2 Lev. 117. The word *adhuc* refers to the time of the plaint (*Hent v. Barton*, 3 Lev. 246. *Carter v. Calthorpe*, id. 345); and *semble*, a breach that *post hæc*, &c., the defendant did, &c., cannot be supported; those words must refer to the filing the declaration, so that the breach is after the declaration (*Rich v Wilks*, 11 Mod. 133). So on articles, dated 30th September, 1718, the breach assigning that afterwards, and before the end of the term aforesaid, *i.e.* on the 1st of May, 1718, A. did, &c., was held good, and the *scilicet* was rejected as repugnant. *Hammond v. Rogers, supra* in text.

Declaration against an executor for arrears of rent in the *detinet* only shall be good after verdict, although it is not alleged whether the arrears were in the lifetime of the testator or after his death, and they shall be presumed to have become due in his lifetime. *Stephenson v. Stepkenson*, 1 Sid. 375; 2 Keb. 400.

If the heir brings covenant for non-repair, he ought not to allege a breach in his ancestor's time, as that belongs to the executor. *Anon.* 11 Mod. 45. *Vivian v. Campion*, 1 Salk. 141; 2 Ld. Raym. 1125. *Lucy v. Levington*, 1 Vent. 175. *Kingdon v. Nottle*, 4 M. & S. 53.

On an agreement by A. to sell to B. so many stacks at 35*l.* for every hundred, without saying *secundum ratam*, he cannot recover for any quantity less than a hundred; but if he declare for 350, he shall be allowed to enter a *remittitur* for the 50, nor is the variance fatal. *Ingledew v. Cripps*, 2 Ld. Raym. 814; 2 Salk. 658; Holt, 200. Likewise, if a lessor assigns a breach of covenant in non-payment of two years and three months' rent, which was reserved annually, a *remittitur* may be entered for the excess. *Buckley v. Kenyon*, 10 East, 139. When the jury give greater damages than the plaintiff has declared for, it may also be cured by entering a *remittitur* of the surplus before judgment (Yelv. 45; 2 Stra. 1110, 1171); or the plaintiff may amend his declaration and have a new trial; but if judgment be entered for more damages than are laid in the declaration, it is error. 2 Black. Rep. 1300; 2 Tidd's Pr. 7 edit. 903.

[1] To an action of covenant there is properly no general issue, therefore the defendant must specially controvert the deed, or show that he has performed the covenant, or, is lawfully excused from the performance of it, or admitting the breach, that he is discharged by matter *ex post facto*, as a release, &c.

Non est factum.—The most usual plea is that of *non est factum*, whereby the defendant denies that the instrument on which the action is founded is his deed; and formerly under it might give in evidence that the defendant, at the time of its execution, was a feme covert, or lunatic.

A plea in abatement, by a defendant sued in covenant as the assignee of a lease, that the right and interest in the premises vested in him jointly with another person therein named, is bad, for not showing how the premises came into the joint possession of himself and that person. *Heath v. Livingston*, 7 Jur. 934, Ex.

But now in actions on specialties the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. Reg. Gen. T. T. 16 Vic. r. 10.

To a declaration in covenant upon an indenture of lease, by the lessor against the assignee of the lessee, a plea, that the indenture was not signed by the plaintiff, or by any agent authorised in writing, is bad. *Aveline v. Whisson*, 4 Man. & G. 801.

Performance.—A general performance should not be pleaded where there is an express negative, and likewise an affirmative in the same covenant; but the defendant must set forth that he has not done what he covenanted not to do, and that he has fully completed what he covenanted to perform; and if any of the covenants are in the disjunctive, he must show what part or division he has performed.

Nil habuit in tenementis.—In regard to the plea of *nil habuit in tenementis*, it is an established rule that a tenant cannot be permitted to controvert the title of his landlord so long as the lessee continues to

enjoy the land demised; for it would be contrary to equity that he should be suffered to deny a title under which he derives and hold his present possession: therefore, if an action be brought on a lease by indenture, and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the indenture, which would operate as an estoppel, may demur, because the estoppel appears on the face of the record.

A tenant cannot plead in bar that the lessor had only an equitable estate in the premises, for that in effect would be pleading *nil habuit in tenementis*.

Other covenants in bar, and recitals.—Another covenant in the same deed may be taken advantage of in bar, for the intention and meaning of the parties is to be collected from the whole of the instrument; as, in an action of covenant for rent, the defendant was allowed to plead another covenant in the same indenture, that he, as lessee, might retain as much of the rent for repairs and charges as was claimed by the plaintiff, though generally reciprocal covenants cannot be pleaded one in bar of another, especially if they do not go to the whole of the consideration; for the damages might be unequal and disproportionate: and in every case in assigning a breach of covenant it is not necessary to aver performance on the part of the plaintiff, unless there be a condition precedent.

By deed, after reciting a grant to A. in fee, and that the defendant's wife was the heiress of deceased, who died intestate, and reciting an appointment in fee by the defendant and his wife in favour of the plaintiff, the defendant covenanted "that notwithstanding any act by him or his wife, or A. committed," he and his wife were lawfully seised, and "that, notwithstanding any acts as aforesaid," he and his wife had a good right to convey; and that it should be lawful for the plaintiff to quietly occupy without interruption by the defendant and his wife, or any person lawfully claiming under them or A., and that the defendant and his wife, and all persons claiming under them or A., would execute to the plaintiff all further assurances. In an action for breach of this covenant for quiet enjoyment, the declaration averred that P. "claimed as heir-at-law of A., deceased, lawful right and title" to the premises, and then set out a recovery in ejectment by P., by which the plaintiff was evicted. The defendant set out the deed, and pleaded that A. died intestate, leaving the defendant's wife her only child and heiress-at-law, and that the plaintiff instigated P. to claim a right and title to the premises, and that P. in consequence made the claim and prosecuted the ejectment. At the trial, the jury found that the defendant's wife was not the heiress-at-law of A.:—*Held*, first, that the jury were not estopped by the recital in the deed of the heirship of the defendant's wife from finding that she was not, in fact, such heiress. *Young v. Raincock*, 7 C. B. 310; 13 Jur. 539; 18 L. J. C. P. 193. *Held*, secondly, that the plea without such allegation of the heirship of the defendant's wife was no answer to the action. (Id.) *Held*, thirdly, that the allegation in the declaration that P. "claimed, as heir-at-law of A., lawful title," sufficiently showed, after being pleaded over to, that he had a lawful title. (Id.) *Held*, fourthly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words of the covenant for title and power to convey to any act done by the defendant and his wife. (Id.)

Accord and Satisfaction.—Accord and satisfaction is a proper plea in covenant; for, notwithstanding the general principle, that in an action founded on deed it must be discharged by a matter of as high a nature, and cannot be discharged by parol (*West v. Blakeway*, 3 Scott, N. R. 199; 2 Man. & G. 729), that rule will not be applicable where the action is not founded merely on the deed, but is for the recovery of a compensation in damages arising from a wrong or subsequent default, which wrong constitutes the cause of action, and not the deed; and in every action where damages only are demandable by way of reparation, accord with satisfaction is a good plea in bar.

A covenant for payment of a sum certain, although the payment does not accrue until after notice given, cannot be discharged by parol before breach. *Spence v. Healey*, 8 Ex. 668; 22 L. J. Ex. 249.

The plaintiff declared against the defendant as administratrix, upon a covenant under seal entered into by the testator; the defendant pleaded that the testator had died insolvent, and then alleged a parol agreement with the plaintiff, upon the faith of which she was induced to take out letters of administration, to assign the deed to the plaintiff, the promise being, that the plaintiff would not seek to charge her in that capacity: the plaintiff replied, taking issue upon the premises alleged in the plea:—*Held*, that the plea was bad, as seeking to answer an agreement under seal by a parol promise; and that, at the trial of the cause, it was not to be taken as alleging a deed under seal, but was proved by evidence of a parol agreement; and that proof being given, a verdict for the defendant was rightly entered. *Harris v. Goodwin*, 2 Scott, N. R. 459.

Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn v. Calow*, 1 Man. & G. 589.

In a covenant by A. against B. as administratrix of C., for breaches of covenant in an indenture between A. and C., B. pleads that he took out administration at the request of A., and upon his promise that he would not charge or seek to charge her, as administratrix or otherwise, with any breaches of the covenants contained in the indenture, and that no assets have come to her hands

since the taking out of administration. The plaintiff having replied, taking issue upon the promise:—*Held*, that the affirmative of the issue was supported by a verbal promise, and that the court would not, after verdict for the defendant, assume that a promise under seal had been proved:—*Held*, also, that the plaintiff was entitled to judgment *non obstante veredicto*, on the ground of the insufficiency of such parol promise to bar the action. *Harris v. Goodwyn*, 2 Man. & G. 405.

The declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff, defendant, and J. R., the son of the defendant, should, at the expiration of a reasonable time, execute a deed, by which J. R. was to be apprenticed to the plaintiff, and that the defendant should pay a premium; that a reasonable time had elapsed for executing the deed and paying the premium, and that, although the plaintiff was ready and willing to execute the deed, and to receive J. R., and although the plaintiff requested the defendant to execute the deed and pay the premium, yet he refused, and the defendant exonerated and discharged the plaintiff from tendering the deed for execution. *Plea*, that the defendant did not exonerate the plaintiff. A verdict having been found for the defendant, a rule *nisi* for a new trial for judgment for the plaintiff *non obstante veredicto*, or for a repleader, was refused. *Doogood v. Rose*, 19 L. J. C. P. 246; 9 C. B. 132; S. P. *Thames Haven Dock Co. v. Brymer* (in error), 5 Ex. 696; and *Cort v. Ambergate Railway Co.* 20 L. J. Q. B. 460:—*Held*, also, that the declaration, without the averment of exoneration, would have been bad; that the issue as to the exoneration was a material issue. As to discharge of bankruptcy, *see* s. 161, 24 & 25 Vic. c. 134, *ante*, vol. ii. p. 277. Forms of Pleas, B. & L. Precedents, 298.

Performance of Covenant.—The defendant covenanted with the plaintiff to use his best endeavours and all due diligence to forward certain works, so that the works should be completed in as short a time as practicable. To a declaration, alleging as a breach that the defendant did not nor would use his best endeavours, or due or any diligence to forward the works, so that the same might be completed in as short a time as practicable, he pleaded that he did use his best endeavours and all due diligence to forward the works, so that the same might be completed in as short a time as practicable; but, by causes wholly beyond his control, and without any default on his part, he was hindered and prevented from forwarding the works:—*Held*, that the plea was good as a traverse of the breach. *Vickers v. Overend*, 30 L. J. Ex. 388.

Dispensation with Performance.—A plaintiff under seal contracted to build two steam-vessels for the defendant according to specifications, the deed containing a stipulation that the plaintiff should not be entitled to payment for any alterations or extra work unless authorised in a particular manner. To a count seeking to recover on the contract for alterations and extra works not so authorised, which alleged that the defendant had dispensed with the said stipulation, he pleaded that the dispensation was not by deed; and the plaintiff replied, on equitable grounds, that the defendant by parol directed such alterations and extra works; that the plaintiff did so at his request, and the defendant took to the ship, and enjoyed the benefit of the alterations and extra works, and by reason of the premises the plaintiff was in equity discharged from the stipulation in the deed, and ought not in equity to be allowed to set up the want of a discharge by deed:—*Held*, that the replication was bad, as it showed that the plaintiff had originally no ground of action. *Thames Iron Works and Ship Building Co. v. Royal Mail Steam-Packet Co.* 9 W. R. 942, C. P.

To an action on a covenant for building a house within a reasonable time, it is no defence that a reasonable time had not elapsed since the plaintiff required the defendant to build the house. *Fisher v. Ford*, 4 Jur. Q. B. 1034.

Infancy.—The general rule of the common law, that infants are not liable on their contracts except for necessaries, &c. is equally applicable to an action of covenant where the defendant may insist on his infancy in bar, although the suit be on his indenture of apprenticeship; but such defence should be pleaded specially, as it cannot be given in evidence under the plea of *non est factum*.

Release.—A release of all covenants is a good discharge of the covenant before it is broken, but a release of all actions, suits, and quarrels would not be so; for at the time of the release no debt, duty, or cause of action may have existed.

In covenants for non-payment of rent the defendant cannot plead a release by the plaintiff of all demands on a day prior to the rent in question becoming due; and in every instance where a discharge is pleaded in the nature of a release the defendant must state it to be by deed, or it will be bad; for, as the covenant is under seal, by deed only can it be discharged.

Entry and Eviction.—To constitute a good plea of entry and eviction in bar to an action of covenant for rent, it is necessary that the eviction should have been tortious, and such as ousts the defendant of his possession; for a mere trespass or temporary intrusion will not be sufficient to occasion a suspension of the rent, or deprive the plaintiff of his right to recover; and if the dispossession be effected by a stranger, it is incumbent on the defendant to show that the intruder had a good title, and to state specifically how his right accrued, in order to give the plaintiff an opportunity of controverting the stranger's claim.

To a plea of entry and eviction, the plaintiff may reply an entry by virtue of an adequate power, and traverse the eviction.

In covenant by landlord against tenant, on a farming lease, assigning breaches on the defendant's covenants:—1. To repair; 2, not to plough meadow land; 3, or depasture

1*st. Oyer.*[1]

(*a*) *In Denial.*

(*b*) *In General.*

OLDERSHAW v. THOMPSON, 5 M. & S. 164; 1 Stark. 311.
TAYLOR v. BATTEN, Comb. 255.

There was no general traverse or denial in covenant, even before the new rules.[2]

Per Cur. It is certainly a misconception of what is the general issue in covenant to say that *non est factum* is that plea; and

Abbott, J., said, "I have often heard it doubted, whether there is any general issue in covenant."

(*c*) Non Infregit Conventionem.[3]

(*d*) Nil Debet.[4]

2*d. In Avoidance or Estoppel.*

(*a*) Nil Habuit in Tenementis.[5]

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orchards; 4, or cut, lop, or injure trees, woods, or plantations, &c.; 5, or assign or under-let the demised premises, or any part thereof, without the plaintiff's consent in writing: the defendant pleaded, that, before any of the breaches assigned, he was evicted and kept out of part of the demised premises by the authority of the plaintiff:—*Held*, that the plea afforded no defence to the action. *Newton v. Allin*, 1 Gale & D. 44.

Set-off.—In covenant upon an indenture for non-payment of rent, the defendant pleaded *non est factum*, and gave notice of set-off at the assizes; the judge presiding at the trial was of opinion that such a notice was not, under the issue, admissible; but upon a motion for a new trial the court held that the evidence ought to have been received, for the general issue mentioned in the act must be understood to be any general issue, and accordingly ordered a new trial; though general unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff, cannot be taken advantage of by way of set-off.

Riens in Arrear.—The plea of *riens in arrear*, or payment at the day, is proper in an action of covenant for non-payment of rent, but levied by distress cannot be pleaded; for that is a confession that it was not paid at the day to which time the breach of covenant refers.

[1] The old practice of profert and oyer is abolished by s. 55, 16 & 17 Vic. c. 76; and by s. 56, "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

[2] The defendant, therefore, must specially deny the making of the deed, or show that he has performed the covenant, or is lawfully excused the performance of it; or, admitting the breach, that he is discharged by matter *ex post facto*, as a release, &c. Tidd. Prac. 602. By the plea of *non est factum* the defendant denies that the instrument on which the action is founded is his deed; and under it formerly might have given in evidence that the defendant, at the time of its execution, was a feme covert (12 Mod. 101; 2 Bl. Rep. 1152); or lunatic (Stra. 1104; 4 Co. 123); and he may now avail himself of any erasure, alteration, or addition (2 Co. 28); or of any material variance between the deed produced in evidence and the one described in the declaration (9 East, 188); but under this plea the defendant will not be permitted to controvert or dispute the title of the plaintiff under whom he derives possession. 2 Bl. Rep. 1152. If the plaintiff declares for a breach of covenant, and states the covenant by itself in its own absolute terms, without the qualifying context which belongs to it, this, being an untrue statement in point of substance and effect of the deed, will entitle the defendant to a nonsuit on the ground of a variance, on the plea of *non est factum*, unless an amendment be allowed. Adm. *per cur.* in *Howell v. Richards*, 11 East, 633; Selw. N. P. 5th edit. 517. *See* 5 Mee. & W. 447; 12 id. 688; 7 Ad. & E. 143; 13 Q. B. 536.

[3] A plea of *non infregit conventionem* to a breach assigned, that the defendant was not seised in fee according to his covenant, is bad. *Walsingham v. Comb*, 1 Lev. 183; 1 Sid. 289. *Pitt v. Russell*, 3 Lev. 19. *Boone v. Eyre*, 2 W. Black. 1312. *Hodgson v. East India Co*, 8 Term Rep. 278. *Taylor v. Needham*, 2 Taunt. 278.

[4] *Nil debet* is no plea to covenant for non-payment of rent on an indenture (*Tyndal v. Hutchinson*, 3 Lev. 170), nor to an action of debt for a penalty for performance of a covenant. *Warren v. Consett*, 8 Mod. 106, 323, 382; 11 id. 396; 2 Stra. 778; 2 Ld. Raym. 1500.

[5] A plea of *nil habuit in tenementis*, after enjoyment by the defendant, is not good in an action of covenant for non-payment of rent. *Palmer v. Ekins*, 11 Mod. 407; 2 Stra. 817; Barnard, 103. In regard to the plea of *nil habuit in tenementis*, it is an established

(*b*) *In Estoppel.*[1]

3. *In Excuse.*[2]

4. *In Justification.*[3]

5. *In Discharge.*

(*a* 1) *By Common Law.*

(*a*) *Acceptance of Rent from Assignee.*

ARTHUR v. VANDERBANK AND ANOTHER, 2 Barnard, 372; 7 Mod. 198; W. Kely, 167; *nom.* ARTHUR v. VANDERPLANK. JENKINS v. HERMITAGE, Freem. 377; 3 Keb. 367.

Acceptance of rent from the

To covenant for non-payment of rent, the defendants pleaded that their tes-

rule that a tenant cannot be permitted to set up any objection to the title of his landlord, so long as the lessee continues to enjoy the land demised; for it would be contrary to equity that he should be suffered to deny a title under which he derives and holds his present possession. 3 T. R. 442. Hence a lessee of land in the Bedford Level cannot object to an action brought by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2, c. 17, for want of being registered. *Hodson v. Sharpe*, 10 East, 350. If an action be brought on a lease by indenture, and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff instead of replying to the indenture, which would operate as an estoppel, may demur; because the estoppel appears on the face of the record: 2 Vent. 69; Co. Litt. 47; 7 T. R. 59; Selw. N. P. 5th edit. 513. Nor for non-payment of a sum in gross (*Clarke v. Peppin*, 2 Vent. 99). Nor is such a plea available against covenant brought for rent in arrear by the assignees of a bankrupt lessor. *Parker v. Manning*, 7 T. R. 537. So to covenant for not repairing, a plea that the plaintiff had only an equitable estate in the premises, was not admissible, being tantamount to *nil habuit in tenementis*. But it appears that the tenant was not estopped from showing that the plaintiff was seised only in right of his wife for her life, and that she died before breach of the covenant. See *Hill v. Saunders*, 4 B. & C. 529. *Blake v. Foster*, 8 T. R. 487.

[1] Where an under-lessee covenants to perform and keep all the covenants in the original lease which is recited in the under-lease, the plaintiff alleging that the under-lease was made *inter prædictas partes*, need not set forth the fact of sealing and delivery of the original lease; and the defendant, by his execution of the under-lease, is estopped from saying there was no such lease, nor covenants (*Atkinson v. Coatsworth*, 8 Mod. 33; 1 Stra. 512). So also where A., as surety, executes a bond conditioned for the performance by R. G. of the covenants contained in a certain indenture made or expressed to be made between plaintiff and the said R. G., A. is estopped from pleading that the indenture never was executed. *Hosier v. Searle*, 2 B. & P. 299. *Collins v. Rybot*, 1 Esp. 157.

On a covenant to convey all his title, the covenantor is estopped to say he had none (*Anon.* 12 Mod. 399. *Scounden v. Hawley*, Holt, 174); but a licensee of a patent, who covenanted to use it according to the specification, is not estopped by his deed from proving that the invention is not new, and thereby show that the patent was void. *Hayne v. Maltby*, 3 T. R. 438.

[2] Where a person has covenanted to perform a certain thing, a plea that he was unable from certain circumstances is no excuse. *Barker v. Hodgson*, 3 M. & S. 267. Thus, if A. covenants with B. to procure him a grant of land from C., it is no plea to an action of covenant to say that C. had no title to the lands (*Scounden v. Hawley*, Holt, 174. *Anon.* 12 Mod. 399; Comb. 172); or, where he covenants to repair, it is no plea in excuse that there was an outstanding term in another person, and that the covenantor was not in possession. *Chesterfield v. Bolton*, 2 Com. 626.

A. covenanted to grant an estate for the lives of two persons, which the plaintiff should name, and to deliver possession at Christmas; it was held to be a good plea in excuse that the plaintiff had not named the lives. *Twiford v. Buckly*, Carter, 205; S. C. Freem. 121; *nom. Twyford v. Buntley*. Thus, too, where A. covenanted that a ship should go and return in six months, and B. that the ship should be furnished with men, a plea in excuse that the ship was not supplied with men was deemed sufficient. *Wynne v. Fellowes*, 1 Show. 384; Holt, 466. But where A. covenanted to purchase all his malt of B., and B. covenanted to supply *good* malt on request, but, in case of neglect, that A. might buy it elsewhere; to covenant for buying malt of others, a plea that B. furnished bad malt, without averring a request to send better, was not supportable. *Weaver v. Sessions*, 6 Taunt. 154; 1 Marsh. 505.

A tender may be pleaded on a mere dry covenant for payment of rent (*Johnson v. Clay*, 7 Taunt. 486; 1 J. B. Moore, 200), and must be pleaded to be at the place appointed for such payment. *Marshall v. Wisdale*, Freem. 148.

Party pleading an excuse must show that all was done that he was bound to do. *Wynne v. Fellowes*, 1 Show. 334; Holt, 466.

[3] To an action of covenant for ploughing a piece of land called Lane's Meadow, the

assignee is no plea in bar to covenant against the lessee.

tatrix assigned over the term, and the plaintiff accepted the rent from the assignee.

The court were of opinion that such an acceptance of rent was no bar to a recovery in covenant, although it was otherwise in debt.—Judgment for the plaintiff. *See* Sty. 265; 3 Rep. 22; Dy. 257; Brownl. 214; 1 Jones, 223; Cro. Car. 188, 580.

(*b*) *Accord and Satisfaction.*[1]

(*c*) *Assignment.*[2]

(*d*) *Attainder.*[3]

(*e*) *Defeasance, and by whom to be Pleaded.*[4]

(*f*) *Eviction.*[5]

(*g*) *Judgment Recovered.*[6]

(*h*) *Letter of License.*[7]

(*i*) *Parol Agreement.*[8]

(*j*) *Release.*[9]

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defendant may plead in justification that the land was arable, though called meadow. *Skipworth v. Green*, 8 Mod. 311; 3 Danv. 272; 1 Stra. 610.

[1] Accord and satisfaction is a proper plea in covenant; for, notwithstanding the general principle, that in an action founded on deed it must be discharged by a matter of as high a nature (Cro. Jac. 99; 8 East, 344), that rule will not be applicable where the action is not founded merely on the deed, but is for the recovery of a compensation in damages, arising from a wrong or subsequent default, which wrong constitutes the cause of action, and not the deed (2 Wils. 376; Lutw. 358); and in every action where damages only are demandable by way of reparation, accord with satisfaction is a good plea in bar. *See* also vol. i. p. 88.

In covenant for not repairing a plea of *accord and satisfaction* is good (*Adams v. Tapling*, 4 Mod. 88); but a bill of exchange given by one of three joint covenantors for payment of a sum of money, upon which judgment had been recovered, is no bar to an action of covenant against the three, unless it be averred that it was accepted in satisfaction, or actually produced the fruit of the judgment (*Drake v. Mitchell and others*, 3 East, 251. *Tapley v. Martens*, 8 T. R. 451. *Marsh v. Pedder and others*, N. P. 4 Camp. 257.

[2] Lessee cannot plead to covenant for non-payment of rent an assignment and tender by the assignee (*Orgill, administrator, &c. v. Kemshead*, 4 Taunt. 642); but an assignment by an assignee, even to a feme covert or pauper, before breach, is a good plea in bar. *Barnfather and another, executors, &c., v. Jordan and another*, 2 Dougl. 452.

[3] Forfeiture by attainder is no plea to covenant for non-payment of rent. *Auriol v. Mills* (in error), 4 T. R. 99.

[4] Where proviso is by way of defeasance of a covenant, it must be pleaded by the party taking advantage of it, otherwise where it is by way of explanation or restriction of the covenant. *Clayton v. Kynaston*, 12 Mod. 221; 1 Ld. Raym. 419; 2 Salk. 573. S. P. *Lacy v. Kynaston*, 12 Mod. 415, 548; 1 Ld. Raym. 688; 2 Salk. 575; 3 id. 298; Holt, 178, 218.

[5] Eviction is a good plea in bar to covenant for rent, as it suspends the rent (*Dalston v. Reeve*, 1 Ld. Raym. 77); but an eviction under a power, or a mere trespass, will not suspend the rent, nor can they be pleaded in bar (*Bushell v. Lechmore*, id. 369): therefore it is no plea to say that the plaintiff pulled down part of the premises demised, but trespass is the proper remedy. *Roper and Ux. v. Lloyd*, T. Jon. 148. S. P. *Hodgskin v. Queenborough*, Willes, 129.

In pleading eviction by a person other than the plaintiff, the defendant must show that the evictor had title to enter, and such title ought to be set out, and the defendant should also show under what process the evictor entered. *Jordan v. Twells*, Ca. Temp. Hard. 171. S. P. *Cooper v. Young*, Fortes. 360. A plea, therefore, that J. S. *habens bonum titulum* entered is bad, without showing that he entered by prior title. *Skinner v. Kilby*, Holt, 542; Carth. 87; 1 Show. 70.

[6] To a second action for the same cause, a former judgment may be pleaded in bar. *Copping v. Slaymaker*, 2 Show. 309; id. 248; T. Jones, 229.

[7] A letter of license and covenant that the debtor should not be sued, &c. *sub pœnâ relictionis debiti*, is a good plea in bar. *Carivil or Carvel, Executor of Dodsworth, v. Edwards*, 1 Show. 330; Holt, 546; Carth. 210.

[8] A subsequent parol agreement is not available in discharge of a former covenant. *Fortescue v. Brograve*, Sty. 8. *See* case, *post*, 525, n. 6.

[9] A release in general terms, reciting the particular purposes for which it is made, is no bar to covenant, not being comprehended within those particular purposes. *Morris v. Wilford*, 2 Lev. 214; 2 Show. 46; 3 Keb. 814, 840; T. Jon. 104; 2 Mod. 108; Freem. 447.

(*k*) *Sale under a* Fieri Facias.[1]

(*l*) *The Acts or Defaults of the other Party.*[2]

(*b* 1) *By Statute.*

(*a*) *Bankruptcy and Insolvency.* *See* vol. ii. p. 279.

(*b*) *Non-Registration of a Deed under an Act of Parliament.*[3]

6*th*. *Plea of Performance.*

(*a*) *Performance generally.*[4]

(*b*) *In what Terms to be pleaded.*[5]

(*c*) *As to the Time of Performance.*[6]

7*th*. *As to pleading Mutual and other Covenants in bar of each other.*[7]

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[1] Nor is a *fieri facias* a plea in bar to covenant. *Auriol v. Mills* (in error), 4 T. R. 99.

[2] Proviso that an annuity should cease if a lady associated, continued to keep company, or criminally correspond with J. F.; all intercourse whatever is within the terms of the deed, and her association with J. F., however innocent, is a good plea in bar to an action of covenant for non-payment of the annuity (*Lord Dormer v. Knight*, 1 Taunt. 417); see *Durant v. Titley*, Ex. Ch. (in error), 7 Price, 577.

[3] Defendant cannot plead in bar to covenant for non-repairs, that the lease was not registered as required by the Bedford Level Act, 15 Car. 2, c. 17; such want of registration only postponing the priority of the lease, but not avoiding it as between the parties themselves. *Hodson and Wife v. Sharp and another*, 10 East, 350.

[4] To covenant for further assurance, or for quiet enjoyment, general performance is a good plea. *Butterfield v. Marshall*, 1 Nels. Lutw. 232. So, where the action is by an assignee against the first lessee on a covenant for quiet enjoyment, free from arrears of rent, a plea that the defendant left money with the plaintiff *eâ intentione* to pay it to the lessor is good. *Griffith v. Harrison*, 4 Mod. 249; Skin. 397; Salk. 196. Where, however, some covenants are in the negative, and others in the affirmative, a plea of performance generally is bad (*Fines v. Dell*, Sty. 163); but where a negative covenant is only in affirmance of a preceding affirmative covenant, it may be supported; but not where the negative covenant is additional to the prior affirmative covenant. *Laughwell v. Palmer*, 1 Sid. 87; *nom. Laughwell v. Fisher*, 1 Keb. 334, 372.

To an action on a general covenant to repair, defendant may plead performance as to all except the repairs of a party-wall, and that he was not the owner of the improved rent under the 14 Geo. 3, c. 78. *Moore v Clark*, 5 Taunt. 90.

[5] Performance must be pleaded in the terms of the covenant. *Scudamore and others v. Stratton and others*, 1 B. & P. 455.

[6] To an action of covenant to pay money at the end of six months after the date of the indenture, the defendant cannot plead payment on a *prior* day, because if found one way it is not conclusive, but he must plead payment on the day. *Dyer and Webber v. Sweeting*, Willes, 585.

In an action of debt where the plaintiff seeks to recover the very rent itself, it is sufficient to show payment after the day on which it became due, or that the lessor distrained upon the defendant, and so satisfied his demand. *Core's case*, Dy. 20, b. *Cecil v. Harris*, Cro. Eliz. 140. But neither of these defences will avail him in covenant or *assumpsit*, because there the plaintiff seeks damages for the defendant's breach of his covenant or agreement; and the plea would itself amount to an admission that he had broken it. *Hare v. Sawill*, 1 Brownl. 19; 2 id. 273; Com. Land. and Ten. 462.

[7] Reciprocal covenants cannot be pleaded in bar of each other. *Cole v. Shallet*, 3 Lev. 41. *Hill v. Thorn*, 2 Mod. 309. *Shower v. Cudmore*, T. Jon. 216. S. P. *Burroughs v. Hays*, Comb. 21. *Guy v. Nichols*, id. 265. *Cooke v. Colcraft*, 3 Wils. 380. But it seems that, in an action of *debt*, a covenant that the lessee may deduct for charges is a good plea in bar. Thus, to debt for rent on a lease for years, the defendant pleaded in bar a covenant by the lessor that the lessee should deduct so much for charges, and the court held that this was a good plea, as the covenant was contained in the same deed, the matter being executory; and that the party should not be put to a circuity of action by bringing his action on the covenant. *Johnson v. Carre*, 1 Lev. 152. But see *Burroughs v. Hays*, Comb. 21; Yelv. 43.

And if A. covenants to pay B. 100*l*. a-year for the use of his (A.'s) wife, until he and she should cohabit together after mutual notice in writing, and they afterwards cohabit without such notice, and B. covenants with A. that during such cohabitation the annual payment shall cease, and A. be indemnified therefrom, as these covenants are mutual, the latter cannot be pleaded in bar

(c) *The Replication.*[1]

(H) *Evidence.*[2]

(I) *Damages.*[3]

of the former. *Gawden v. Draper*, 2 Vent. 217. Yet it is otherwise if the covenants go to the whole of the consideration on each side. *Duke of St. Albans v. Shore*, 1 H. Black. 270. *Boone v. Eyre*, 1 id. 273, n. a. *Fothergill v. Walton and another*, 8 Taunt. 576; 2 J. B. Moore, 630.

[1] Declaration in covenant by A., the surviving lessor in a lease for years, granted by A., B., and C., to the defendant, on a covenant to repair and leave in repair, assigning breaches in not repairing, and in not leaving in repair at the end of the term. *Plea*, that A., B., and C., from the time of making the demise until the death of B., and A. and C. afterwards had a reversion for a longer term of years expectant on the lease; and that after B.'s death, and before any breach of covenant, A. and C. assigned such reversion to D., and thenceforward ceased to have any reversion or interest in the demised premises. *Replication*, that A., B., and C., were not, until the death of B., nor were A. and C. afterwards, possessed of the said reversion in the demised premises in manner and form as alleged in the plea: —*Held* bad, on demurrer, as being a departure from the declaration. *Green v. James*, 6 Mee. & W. 656.

[2] Where the defendant adopts *non est factum* as his plea, the plaintiff will be called upon to prove the signature of the defendant; and under this he may have the benefit of any variance. *Trott v. Smith*, 12 Mee. & W. 688. Thus when a deed is pleaded as a release, *non est factum* puts in issue not only the execution of the deed but also its effect as a release (13 Q. B. 55, 36); and this is the proper plea by which to dispute the alleged effect of the deed. *Smith v. Scott*, 28 L. J. C. P. 425. Under this plea, the defendants, when a corporation, may show that the execution of the deed having their seal was void, because not authorised by the provisions of their act of incorporation. 5 B. & Adol. 866; 24 L. J. Q. B. 327; 25 id. 317.

But any circumstance tending to prove that the deed arose from, or was connected with an usurious or other illegal consideration, or that the party was an infant, or under duress at the time of its execution, will not so totally destroy the deed as to be evidence on this issue, but must be pleaded specially. Bull. N. P. 172.

An assignee of a lease, to show his interest in the premises, is bound to prove the execution of the lease and of all mesne assignments if traversed. 1 Campb. N. P. C. 303. Hence, where the plaintiff claims as assignee, and the conveyance to him is denied by the defendant, it will be necessary for him either to prove a conveyance duly and regularly made, or else payment of rent to him by the defendant.

If a party is sued as assignee of a term, it will be sufficient *primâ facie* evidence for the plaintiff to show that the defendant is an actual occupier of the estate, or pays the rent (Peak. Evid. 267); and on a covenant which runs with the land, evidence that the defendant is in as heir will support a declaration charging him as assignee. 4 T. R. 75.

[3] Where the tenant under a lease, containing a covenant to repair, underlet the premises to one who entered into a similar covenant; and the original lessor brought an action on this covenant in the first lease, and recovered; it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against the under-tenant, for the breach of his covenant to repair. *Neale v. Wyllie*, 3 B. & C. 533; 5 D. & R. 442.

Plaintiff declared in covenant, reciting that P. had leased a house to defendant, and the defendant had, by the lease, covenanted to repair; that defendant had assigned to plaintiff, with covenant that defendant had repaired according to the terms of the lease:—*Breach*, non-repair; alleging, by way of aggravation, that plaintiff had assigned to C., with a covenant that the covenants in the lease had been performed; that C. had sued plaintiff for the non-performance of the covenants in the lease, whereby plaintiff had to pay C. 120*l.* to settle the action, besides the expenses of defending it. *Plea*, payment of 5*l.* into court, and no damages *ultra*. *Replication*, damages *ultra*. Verdict for 45*l.* damages beyond the 5*l.* On motion by defendant for a new trial, on the ground that plaintiff was not liable to C. except for his own acts, and therefore could not charge defendant with the 120*l.* or 119*l.*, the court refused a rule, the verdict being general, and not showing that the jury had allowed damages in respect of C.'s action, and it being defendant's duty to point out at the trial the limitation contended for. *Short v. Kalloway*, 11 Ad. & E. 28.

The court also refused to increase the damages by 119*l.*, which was proved to have been expended in defending the action against C., since the damages recovered by C. exceeded the sum given in the present action, and must, therefore, in part have been attributable to plaintiff's own acts; so that the costs of defence did not appear to be the necessary consequence of defendant's breach of covenant. (Id.)

The plaintiff as surety joined the defendant in a promissory note, and the defendant by deed covenanted with the plaintiff to pay him the amount of the note on a day certain; the note not having been paid:—*Held*, in an action on the covenant, that the measure of damages was the amount of the note,

though it still remained unpaid. *Loosemore v. Radford*, 9 Mee. & W. 657; 1 Dowl. N. S. 881.

In an action of covenant the jury are not restricted to giving nominal damages, though no actual damage naturally arising from the breach is proved (*Hey v. Wyche*, 6 Jur. 559; 12 L. J. Q. B. 83; 2 Gale & D. 569), even although the plaintiff has no reversion. 27 L. J. Ex. 113.

Where, therefore, a lessee had covenanted to insure, and his assignee covenanted to keep the covenants in the original lease, and the assignee having neglected to insure, the lessee paid 5*l.* 10*s.* 2*d.* for insuring the premises, but not according to the terms of the covenant in the lease, and brought an action of covenant against the assignee; the judge having directed the jury that the plaintiff could not call upon the defendant to reimburse the sum paid by him, and having left it to them whether the plaintiff was entitled to more than nominal damages, the court refused to set aside a verdict, with damages 5*l.* 10*s.* 2*d.* (Id.)

For instance, on a covenant to repair, as much will be given as will put the premises in repair, and they ought to be applied to that purpose (*Vivian v. Champion*, 2 Ld. Raym. 1125; 1 Salk. 141. *Anon.* 11 Mod. 45; Holt, 178. S. P. *Shortridge v. Lamplugh*, 2 Ld. Raym. 798; Holt, 621; 7 Mod. 71; 2 Salk. 678); and if a lease contains a general covenant to repair, and also a covenant to insure for a specified sum, and the house be burnt down, the tenant's liability is not limited to the amount of the sum to be insured. *Digby v. Atkinson and another*, 4 Camp. 275.

In an action on a covenant to repair, by a lessee against a sub-lessee, the former cannot recover as special damage the costs of defending an action brought against him by his lessor, on account of the same dilapidations. *Walker v. Hatton*, 2 Dowl. N. S. 263; 10 Mee. & W. 249. See *Tindal v. Bell*, 11 id. 228.

B. and P., the owners of an unexpired term of seventy-two years in a house and premises, let them to J. G. for twenty-one years, under the usual covenants to pay the rent and keep the premises in repair, and afterwards they assigned the reversion to G. B.; J. G. had previously assigned the residue of his term of twenty-one years to the plaintiff, with the usual covenants. The plaintiff afterwards assigned the term to the defendant, with similar covenants to pay the rent and to keep the premises in repair, and with a covenant that the defendant would observe and fulfil all the covenants of the former lease, and that he would save harmless and indemnify the plaintiff from all costs, damages, and expenses which might be incurred by reason of any delay, breach, or default in payment or performance thereof. On the rent becoming due and unpaid, and the premises falling out of repair, G. B. brought an action against J. G., who suffered judgment by default. J. G. afterwards brought an action to recover the amount so paid by him and his costs. The plaintiff defended the action unsuccessfully, and he became liable to pay to J. G. the amount of the judgment by default, and also of the costs of that action. The plaintiff then sued the defendant, not having paid that amount to J. G., and judgment not having been signed in the action against him:—*Held*, that the plaintiff was entitled to recover from the defendant the amount of the rent and repairs, and the costs of the action in which J. G. had suffered judgment by default, but that he was not entitled to the costs of the action brought against him by J. G. *Smith v. Howell*, 6 Ex. 730; 20 L. J. Ex. 377.

Where the defendant's covenant is an absolute one to do a particular thing, as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his covenant, and a plea of *non damnificatus* would be bad. Hence, when a party covenants to pay off incumbrances on an estate by a particular day, damages may be recovered to the extent of the incumbrances, although no actual injury has been sustained. *Lethbridge v. Mytton*, 2 B. & Adol. 772. *See* 1 Wms. Saund. 117, n. 1.

If the rent-day for the last half year's rent do not fall within the term, the plaintiff may recover damages for all, except the last half year. *Long v. Burroughs*, 1 Kenyon, 247.

Tenant for life can only recover damages commensurate with the injury done to his life-estate, and not damages which may be sustained by the reversioner. *Evelyn and Wife v. Raddish and others*, Holt, 543; 7 Taunt. 411. So, if an assignee of an assignee erects buildings on the premises after the assignment, he cannot, under a breach of covenant for quiet enjoyment, recover the value of the buildings, unless the declaration state the special damage; and *quære* whether, even then, he could recover? *Lewis v. Campbell*, 3 J. B. Moore, 35; 8 Taunt. 715 (in error); 3 B. & A. 392.

When part of the special damage laid in the declaration does not fall strictly within the covenant broken, it is to be presumed, after verdict, that the jury were directed to attend only to the damage relevant to the actual breach. *Lewis v. Campbell, supra.*

In covenant, where the precise sum is agreed upon by the parties in the nature of liquidated damages, that very sum is the ascertained damage, and the jury are confined to it. *Lowe v. Peers*, 4 Burr. 2225.

Lessee covenanted to pull down part of a building demised to him, for the lessor to make a way across it; no right to *use* such way being reserved to the plaintiff, he can only recover nominal damages for the breach. *Good v. Hill* (*executrix, &c.*), 2 Esp. 690.

If damages are given generally on the whole declaration, and any of the breaches are badly assigned, judgment must be ar-

(K) *Costs.*[1]

VI. Whether Covenant shall be considered as Defeated or Discharged, and by what means.

1st. By the Act of God.[2]

2d. By the Act of Law.

(A) *Common Law.*

(*a*) *Merger or Extinguishment.*[3]

(*b*) *Destruction of the Instrument in which the Covenant is contained.*[4]

(*c*) *When an Infant and another are Joint Covenantors.*[5]

(*d*) *Where one of two Joint Covenantors suffers Judgment by Default, and Judgment is given against the other.*[6]

(B) *Statute Law.*

(*a*) *In general.*[7]

(*b*) *In particular instances.*[8]

3d. By the Acts of the Parties.

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rested on motion, on account of the uncertainty of apportioning them. *Sicklemore v. Thistleton*, 6 M. & S. 9. And where the jury assesses the damages generally, breaches being assigned for specific as well as unliquidated damages, the court cannot separate them to allow interest on one breach. *Martin v. Emmote* (in error), Ex. Ch. 6 Taunt. 530; 2 Marsh. 230.

Where the damages in covenant are incorrectly entered on the *postea*, the same may be amended by the judge's notes. *Newcomb v. Green*, 1 Wils. 33.

In an action of covenant for a *sum ascertained*, if a jury, on a writ of inquiry, mitigate the damages, a new writ will be granted, though it is otherwise if the plaintiff sue for *damages;* then the jury are the judges of the *quantum*. *Parr v. Purbeck*, 8 Mod. 196, 213.

[1] The law is the same as in other actions upon contracts. *See ante*, p. 287.

[2] The act of God shall not discharge the performance of a covenant. *Barker v. Hodgson*, 3 M. & S. 267.

[3] A covenant by A. with his heir is extinguished on A.'s death. *Mudge v. Mudge*, 1 Com. 332. So, if a mortgagor and mortgagee for ninety-nine years underlet for eleven, and the residue of the ninety-nine years, and the ultimate reversion in fee become vested in the same person in the same right, by which means the former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. *Webb v. Russell*, 3 T. R. 393.

[4] To covenant by an heir against the lessee of his father, the defendant may plead that the lessor was only tenant for life, and on his death the lease was determined, and the covenants at an end. *Brudnell v. Roberts*, 2 Wils. 143. And if a tenant for life and reversioner (an infant) make a lease, in which the lessee covenants for payment of rent, the confirmation of the lease by the reversioner, after death of tenant for life, having after such death attained his majority, will not bind the lessee in an action of covenant, as the lease became void on the death of the tenant for life. *Ludford v. Barber*, 1 T. R. 90.

[5] Where an infant and another covenant together, the covenant of the party of full age is binding. *Farneham v. Atkins*, 1 Sid. 446. Thus also, if A. and B. (an infant) covenant jointly and severally for payment of an annuity to a third person, the infancy of the latter will not discharge A. from his responsibility. *Haw v. Ogle*, 4 Taunt. 10.

[6] In covenant against two, if one suffers judgment by default and the other proves performance, the covenant as to both is discharged. *Porter v. Harris*, 1 Lev. 63; *nom. Boulter v. Ford and Harris*, 1 Keb. 284; 1 Sid. 76.

[7] If a covenant be rendered unlawful by the government of the country, neither party is liable to damages for non-performance (*Barker v. Hodgson*, 3 M. & S. 267. *Brason v. Dean*, 3 Mod. 39. *Semb. Dean v. Tracey*, Skin. 161, *cont.*); nor is he liable on a covenant not to do a thing, where an act of parliament afterwards compels a performance. *Brewster v. Kidgill*, 12 Mod. 166; 1 Salk. 198; 2 id. 615; 5 Mod. 368; Comb. 424, 466; Carth. 438; 3 Salk. 340; Holt, 175, 609, 669; 1 Ld. Raym. 317.

[8] The statute 7 Geo. 1, c. 28, which vested the estates of directors of the South-sea company in trustees, did not exonerate the directors from express covenants to pay rent. *Hornby v. Houlditch*, Andr. 40.

(A) *Covenantor.*

(*a*) *Assignment.*[1]

(*b*) *Bankruptcy.*[2]

(*c*) *Inability.*[3]

(*d*) *Intermarriage.*[4]

(B) *Covenantee.*

(*a*) *By Deed.*

1*st. Release before Covenant broken.*[5]

(*b*) *By Parol.*

1*st. Where some other Act or Time substituted.*[6]

2*d. Where Performance absolutely dispensed with.*[7]

(*c*) *Where Performance rendered Impossible by Covenantee.*[8]

(*d*) *By accepting Satisfaction from another Party.*[9]

4th. By the Acts of Strangers.[10]

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[1] An assignment by a lessee of his lease with the consent of lessor, and acceptance by him of rent from assignee, will not discharge the lessee of liability on his covenant to pay rent. *Jodderell v. Cowell*, Ca. Temp. Hardw. 343.

[2] A covenant to indemnify against rent in an assignment of a lease is not discharged by the bankruptcy of the covenantor. *Mayor v. Steward*, 4 Burr. 2440. *See* p. 245, vol. ii.

[3] If A. expressly covenants to do an act, his inability without his own default will not discharge him from performing it. *Shubrick v. Salmond*, 3 Burr. 1637. *See* 3 M. & S. 267.

[4] It seems, that a covenant by A. with his intended wife, to give her leave to dispose of property by will, is not discharged by their intermarriage. *Anon.* 1 Vent. 344. *See* further, as to the effect of marriage on contracts made by a *feme* before marriage, *post*, Husband and Wife.

[5] A release of all demands (*Henn v. Hanson*, 1 Lev. 99; 1 Sid. 141. S. P. *Trevil v. Ingram*, 2 Mod. 281; id. 93; 1 Mod. 216; 1 Vent. 314; 2 Lev. 210; 3 Keb. 785, 829), or of all writings obligatory, will not discharge a covenant for payment of money not then due. *Carthage v. Manby*, 2 Show. 90.

[6] Performance of a covenant cannot be dispensed with by subsequent parol agreement (*Thompson v. Brown*, 7 Taunt. 656; 1 J. B. Moore, 358; overruling *Hotham v. East India Co.* 1 Dougl. 272. S. P. *Sellers v. Bickford*, 1 J. B. Moore, 460. *Cordwent v. Hunt*, 8 Taunt. 596; 2 J. B. Moore, 660). Thus, covenant for payment of money (*Rogers v. Payne*, 2 Wils. 376), or a proviso not to let or assign without leave in writing, under a forfeiture, can only be discharged by deed (*Roe d. Gregson, Widow, v. Harrison*, 2 T. R. 425. S. P. *Mease v. Mease*, Cowp. 47); nor can a covenant to build a house within a certain time be extended by parol. *Littler and another v. Holland*, 3 T. R. 590. S. P. *Brown v. Goodman*, id. 592 n. S. P. *White and others v. Parkin and others*, 12 East, 78. Where A. covenants to convey certain lands to B., and in consideration thereof B. covenants to pay him 1000*l.*; if A. conveys only part of the land, and an annual rent in substitution of the rest, which is accepted by B., A. cannot maintain an action for the 1000*l.* on B.'s covenant; for A. must show that he had done everything which he had covenanted to do (*Heard, assignee of Watts, a bankrupt, v. Wadham, executor of Wadham*, 1 East, 619. So where in a charter-party the freighter covenanted, on the delivery of the homeward-bound cargo at her port in Great Britain, to pay freight, &c., and the vessel on her outward voyage was seized and detained for a long time by strangers, a tender by the owner of the vessel to complete the voyage was held not to entitle him to freight, because the performance was not completely in his power, but was liable to be disappointed by various accidents of the seas. *Smith v. Wilson*, 8 East, 437; 6 M. & S. 78.

[7] But on mutual agreements, if one tenders performance, and is discharged therefrom by the other, he may maintain an action against the other for not performing his part. *Jones and another, assignees of Gardiner, a bankrupt, v. Barkley*, 2 Dougl. 684.

[8] A covenant rendered by the covenantee impossible to be performed, shall be discharged. *Bridges v. Bedingfield*, 2 Mod. 27.

If A. covenants to do an act, to legalise which certain circumstances are necessary to be performed on the covenantee's part, on his omission A. is not liable for a breach (*Gallini v. Laborie*, 5 T. R. 242. S. P. *Hotham v. East India Co.* 1 id. 638); and want of notice will discharge the covenantor, where the covenant is in the alternative, at the option of the covenantee.

[9] Acceptance of satisfaction from an assignor by the assignee is no bar to his action against the lessor on his covenant for quiet enjoyment. *Whitway v. Pensent*, Sty. 300.

[10] It seems doubtful whether a covenant to

COVERTURE. *See* Husband and Wife.

COW-Stealing. *See* 24 & 25 Vic. c. 100, ss. 10, 11; *post*, Larceny.

CRIER, in Superior Court. One of the judge's clerks acts as crier. *See* 15 & 16 Vic. c. 73, s. 8.

CRIME. *See* Arson, vol. i. p. 539; Burglary, *ante*, p. 2; *post*, Larceny; Murder, &c. &c. Crimes are usually classified into Treason, Felonies, and Misdemeanors. *See* those titles.

CRIMINAL Conversation. The action for criminal conversation was abolished by the 20 & 21 Vic. c. 85, s. 59, which enacts, that "after this act shall have come into operation, no action shall be maintainable in England for criminal conversation."

CRIMINAL Information. *See* Information.

CRIMINAL Proceeding.[1] *See* Indictment; Information; Justice of the Peace; Libel, &c.

(A) *Staying Proceedings in Suit pending.*[2]

CRIMINATING Questions. *See* Witness.

CRITICISM. *See* Libel; Slander.

CROPS. *See* Distress; Execution; Landlord and Tenant.

(A) *Setting fire to.*

By the 24 & 25 Vic. c. 97, s. 16, "whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with

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deliver church seats be discharged by the seats being pulled down before the day named. *Bridges v. Bedingfield*, 2 Mod. 27.

A covenant to pay a certain annual sum to B., in lieu of his sharing the profits of a vessel, is not discharged by the capture of the vessel if regained. *Gregg v. Stoker*, Forr. 4.

[1] In *Attorney-General v. Radliff*, 10 Ex. 84, the Court of Exchequer were equally divided in opinion, whether an information for the recovery of penalties for smuggling was a "criminal proceeding," so as to exclude the defendant from being a competent witness on his own behalf; the statute 14 & 15 Vict. c. 99, ss. 2 & 3, rendering parties competent as witnesses, specially excepting "any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction." But in *Cattell v. Ireson*, 1 B. & E. 90, the Court of Queen's Bench subsequently held, that an information at petty sessions for the recovery of a fine for illegally snaring game, laid under the 1 & 2 Wm. 4, c. 32, was a "criminal proceeding," so as to exclude the defendant from being a competent witness.

[2] Where the plaintiff may bring a civil action, or proceed criminally on the same subject-matter, he will not be compelled to elect between the two courses. *Jones v. Clay*, 1 B. & P. 191. But where the plaintiff sued a banker for money deposited, and was indicted in respect of the same money, the action was stayed till the indictment was tried. *Deakin v. Praed*, 4 Taunt. 825. Yet this was refused when the money sued for was won at play, and the plaintiff was indicted for cheating. *Anon.* 2 Salk. 649. So it was refused where the plaintiff was indicted for perjury on his affidavit to hold to bail. *Johnson v. Wardle*, 3 Dowl. 550. So, where plaintiff's witnesses at the trial were indicted for perjury. *Warwick v. Bruce*, 4 M. & S. 140. *R. v. Tremearne*, 5 B. & C. 254; 8 D. & R. 590. So though the plaintiff, who had sued for a slanderous imputation of felony, has since been convicted of the felony charged. *Symons v. Blake*, 2 C., M. & R. 416.

or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping." *See* vol. i. p. 544.

CROSS-Action.[1]

CROSS-Remainders. *See* Remainder.

CROSSED Cheques. *See* vol. ii. p. 125; *ante*, p. 95.

CROWN. *See* Customs, *post*, p. 542; Excise; Prerogative.

(A) *Rule as to Payment of Costs by.*

In crown suits relating to the revenue, the Attorney-General suing on behalf of the Crown is entitled to costs, or the defendant is entitled to costs, according to the result.

By the 18 & 19 Vic. c. 90, entitled, "An Act for the Payment of Costs on Proceedings instituted on behalf of the Crown in matters relating to the Revenue, and for the Amendment of the Procedure and Practice in Crown Suits in the Court of Exchequer," after reciting that in divers proceedings instituted by or on behalf of the Crown against the queen's subjects in respect of matters relating to the revenue, no costs are recovered by the Crown except in certain cases, and no costs are paid by the Crown to the subject, and that it is expedient to assimilate the law as to the recovery of costs in such proceedings by or on behalf of the Crown to that in force as to proceedings between subject and subject, enacts, by sect. 1, that "in all informations, actions, suits, and other legal proceedings to be hereafter instituted before any court or tribunal whatever in the United Kingdom of Great Britain and Ireland by or on behalf of the Crown against any corporation or person or persons in respect of any lands, tenements, or hereditaments, or of any goods or chattels belonging or accruing to the Crown, the proceeds whereof or the rents and profits of which said lands, tenements, and hereditaments, by any act now in force or hereafter to be passed, are to be carried to the Consolidated Fund of Great Britain and Ireland; or in respect of any sum or sums of money due and owing to her Majesty by virtue of any vote of Parliament for the service of the Crown, or of any act of parliament relating to the public revenue, her Majesty's Attorney-General, or in Scotland the Lord Advocate, shall be entitled to recover costs for and on behalf of her Majesty, where judgment shall be given for the Crown, in the same manner and under the same rules, regulations, and provisions as are or may be in force touching the payment or receipt of costs in proceedings between subject and subject, and such costs shall be paid into the Exchequer and become part of the Consolidated Fund."

By sect. 2 it is enacted, that "if in any such information, action, suit, or other proceeding, judgment shall be given against the Crown, the defendant or

[1] In cases where the cross claim of the defendant cannot legally be pleaded or taken advantage as a set-off, it may be advisable for the defendant to bring a cross-action. If judgment in the cross-action can be obtained before the plaintiff can issue execution in his action, the court will set off the two judgments against each other. In one case the court even stayed execution in an action till judgment could be obtained by the defendant in his pending cross-action, so as to enable him to avail himself of, and set off such judgment when obtained. *Masterman v. Malin*, 7 Bing. 435; 1 Dowl. 222. As to the cases in which the cross demand may be made available by way of set-off, *see post*, Set-off.

The non-compliance with a covenant to sail by the first wind is not an answer to a suit for the recovery of freight, it being the subject of a cross-action. *Bornmann v. Tooke*, 1 Camp. 377. So, in an action against an artist for unskilfully varnishing prints, the production of the record of a judgment at his suit against the owner for work and labour generally is no defence, although it be shown that no objection was then made on the score of the imperfection of the workmanship. *Sintzenick v. Lucas*, 1 Esp. 43.

From the anxiety evinced by the courts to prevent circuity of action (see *ante*, vol. i. p. 152), it is difficult to lay down a general principle as to when a cross-action would be deemed necessary. The best rule appears to be, that it should only be resorted to where the matter of defence does not go to the whole of the plaintiff's complaint, or amount to an estoppel, or capable of being made available as a set-off.

defendants shall be entitled to recover costs in like manner, and subject to the same rules and provisions, as though such proceedings had been between subject and subject; and it shall be lawful for the Commissioners of her Majesty's Treasury, and they are hereby required, to pay such costs out of any money which may be hereafter voted by Parliament for that purpose."[1]

CROWN Cases Reserved.

See Appeals, Criminal, vol. i. p. 387.

CROWN Office, Fees in.[2]

[1] Further, in petitions of right costs are recoverable in the same way as in suits between subject and subject. 23 & 24 Vic. c. 34, ss. 11, 12. See *post*, Petition of Right.

The rule that the Crown neither pays nor receives costs has been much modified by the effect of various statutes, and is now of comparatively rare application, but there are still cases to which it applies. Marshall on Costs, p. 340. The rule is thus stated by *Mr. Baron Hullock:*—"It is said that the king and any one suing to his use, if the plaintiff be nonsuited or a verdict pass against him, shall neither pay nor receive costs, for besides that he is not included in the general words of the statutes relative to costs, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them; but true as this principle may be in general, it must be received with some restriction, since by stat. 33 Hen. 8, c. 39, s. 54, it is enacted, 'that the king in all suits upon specialties to himself or to any other for his use, shall recover his just debts, costs, and damages, as common persons do in their suits.'" Hull. L. of C. 19. See *Attorney-General v. Corporation of London*, 19 L. J. Ch. 315.

The statute 18 & 19 Vic. c. 90, extends only to informations or suits to which the Attorney-General or the Lord Advocate is a party. Therefore where, after the passing of the above act, an officer of excise laid an information on behalf of her Majesty before two justices for a penalty under an excise act, and the information being dismissed he appealed to the quarter sessions, who dismissed the appeal with costs, it was held that the court of quarter sessions had no jurisdiction to award costs against the Crown, since the 18 & 19 Vic. c. 90 did not apply. *Lord Campbell, C. J.*, intimated in this case, that he considered the law was not in a satisfactory state, and that it was desirable it should be reviewed, and the Excise and Customs put upon the same footing. *Reg. v. Beadle*, 7 E. & B. 49. As to costs in informations under the Customs Acts, *see* 16 & 17 Vic. c. 127, s. 263; and *post*, Customs. As to Excise information, *see post*, Excise.

[2] *Table of Fees in the Crown Office, as settled by the Judges pursuant to 6 & 7 Vic. c. 20.*

	£	s.	d.
Appearance fee on any information *quo warranto*, each defendant	0	2	0
Pleading fee on the like, each defendant	0	5	0
Retraxit or confession	£0	5	0
Judgment, first defendant	0	7	0
„ each other defendant	0	3	6
Copy of any proceedings when required, not more than ten sheets	0	5	0
If more, per sheet	0	0	6

Writ Fee.

For every attachment, *venire*, *capias*, or *distringas ad respondendum*	0	5	0
Subpœna to testify	0	2	6
Procedendo	0	5	0
Habeas corpus	0	5	0
Attachment of contempt	0	5	0
Venire facias juratorum	0	5	0
Subpœna to answer	0	5	0
Certiorari	0	5	0
Exigent capias utlagatum cum procl.	0	5	0
Capias and distringas ad satisfaciendum	0	5	0
Elegit fi. fa. levari contumace	0	5	0
Capiendo, or other writ after judgment	0	5	0
Mandamus and prohibition	0	5	0
Mittimus	0	5	0
Filing every indictment, information, affidavit, or other proceeding	0	1	0
Every recognisance	0	3	0
Certificate of indictment, &c. found, or information filed, or other proceeding	0	5	0
Attending on subpœna for expenses	1	1	0
Attending at assizes, expenses only			
Attending before House of Lords or Commons, and their committees, for expenses	1	1	0
Search, each term	0	1	0
Signing every information granted by the court	0	6	8
Special jury, nominating	1	1	0
Administering oaths in court			
Certificate of transportation order	0	2	0
Filing the notification	0	2	6
Taxing every bill of costs less than three folios	0	1	0
If more, per sheet	0	0	4
On every reference, and for report	1	1	0
For settling every bond for security	0	10	6
For every examination and acknowledgment on interrogatories	1	1	0
Enrolling interrogatories and answers, per sheet	0	0	4
Affidavits and rules, searching for, per term	0	0	4

CRUELTY. *See* Dissolution of Marriage; Judicial Separation.

CRUELTY to Animals. *See* Animals, vol. i. p. 357.

CUICUNQUE aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potuit. 11 Rep. 52. *Whoever grants a thing, is taken to grant that likewise without which the grant would be of no effect.*[1]

CUILIBET in suâ arte perito est credendum. Co. Litt. 125. *Credence is to be given to one skilled in his own profession.* *See* Evidence; Expert.

CUI LICET quod majus non debet quod minus est non licere. 4 Rep. 23. *He who has power to do the greater ought not to be prohibited from doing the lesser act.*[2]

CUJUS est dare ejus est disponere. Wing. 53. *The donor of a gift may regulate its disposition.*[3]

CUJUS est instituere ejus est abrogare. *The power which institutes may deprive.*[4]

CUJUS est solum ejus est usque ad cœlum. Co. Litt. 4, a. *The owner of land possesses also that which is over it.*[5]

	£	s.	d.
Delivering out under judge's order for production at assizes, &c. .	1	1	0
Putting case in crown paper for argument	0	1	0
Rules—drawing and entering a rule to plead reply, &c., or return a writ	0	1	0
Every other rule	0	2	0
If exceeding seventy-two words, for each eighteen words . .	0	0	4

Copies of rules, half the charge made for the original.

[1] When anything is granted, all the means to attain it and all the fruits and effects of it are granted also, and shall pass inclusive, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such-like words. Shep. T. 89; Hobart, 234; Vaugh. 109. Thus, by the grant of a piece of ground is granted a right of way to it over the grantor's land, as incident to the conveyance; and by the grant of trees is granted a power to enter on the land and cut them down, and take them away. *Howton v. Frearson*, 8 T. R. 56; Noy. *Max.* p. 54; 1 Wms. Saund. 323, n. 6. *Clark v. Cogge*, Cro. Jac. 170. *Beaudely v. Brook*, id. 190. See *Robertson v. Gantlett*, 16 Mee. & W. 289; Broom's *Max.* 363. So if trees are reserved, the landlord has a right to enter on the land for the purpose of felling and taking them away. 1 Wms. Saund. 322, n. 5. *Liford's case*, 11 Rep. 52. *Ashmead v. Ranger*, 1 Ld. Raym. 552. So of a lease of mines, a power is implied to dig for the minerals; and by a grant of fish in a man's pond, power to come upon the banks and fish for them is likewise granted. 1 Wms. Saund. 323, n. 6; Shep. Touch. 89; Co. Litt. 59, b; *Liford's case, supra.* *Foster v. Spooner*, Cro. Eliz. 18. *Saunder's case*, 5 Rep. 12. *See post*, Fish and Fisheries; Mines.

On an application of the above maxim it has been held, that where an act of parliament empowered a railway company to cross the line of another company by means of a bridge, the first-mentioned company had, consequently, the right of placing temporary scaffolding on the land belonging to the latter, if the said placing it were necessary for the purpose of constructing the bridge. *Clarence Railway Co. v. North of England Railway Co.* 13 Mee. & W. 706.

[2] Thus, if there be a custom within a manor that copyhold lands may be granted in fee-simple, by the same custom they are grantable to one and the heirs of his body for life, for years, or in tail. 4 Rep. 23; Wing. *Max.* p. 206. Broom's *Max.* 76.

[3] "The general principle is clear, that the landlord having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable." *Roe d. Hunter v. Galliers*, 2 T. R. 137. *See* 2 Rep. 716; Broom, 304.

[4] "We say in general, he that institutes may also abrogate, most especially when the institution is not only by but for himself. If the multitude, therefore, do institute, the multitude may abrogate; and they themselves, or those who succeed in the same right, can only be fit judges of the performance of the ends of the institution." Sydney's *Disc.* 15, cited Broom, 681.

[5] Land, in its legal signification, has an indefinite extent upwards, so that by a conveyance of land, all buildings, growing timber and water, erected and being thereupon, shall likewise pass. 2 Bl. Com. 18; 9 Rep. 54.

A person has no right to erect a building on his own land which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by overhanging them, or by the flow of water from the roof and eaves upon them, unless a legal

CUM duo inter se pugnantia reperiuntur in testamento ultimum ratum est. Co. Litt. 112, b. *Where there are two repugnant clauses in a will the last shall prevail.*[1]

CUM in testamento ambigue aut etiam perperam scriptum est benigne interpretari, et secundum id quod credibile est cogitatum credendum. Dig. 34, 5, 24. *Where an ambiguous or even an erroneous expression occurs in a will, it should be construed liberally and in accordance with the testator's probable meaning.* Broom's *Max.* 437.

CUM par delictum est duorum, semper oneratur petitor, et melior habetur possessoris causa. Dig. 50, 17, 154. *When both parties are affected with the same fault, the plaintiff must always fail, and the cause of the person in possession be preferred.*[2]

CURATE. *See* Clergyman, *ante*, p. 121.

CURSING. *See* Swearing.

CURSUS curiæ est lex curiæ. 3 Bulst. 53. *The practice of the court is the law of the court.*

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right so to build has been conceded by grant, or may be presumed by user and by operation of the stat. 2 & 3 Wm. 4, c. 71. *See* Easement; Nuisance.

[1] "Of two modes of construction, that is to be preferred which would prevent an intestacy; and where two provisions of a will are totally irreconcileable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail:" *per Parke, B., Morrall v. Sutton*, 1 Phil. 436.

Unless the principle were recognised of adopting one and of rejecting the other of two repugnant clauses, both would be necessarily void, each having the effect of neutralising and frustrating the other. 1 Jarm. 411. Therefore, if a testator in one part of his will gives to a person an estate of inheritance in land, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly. 1 Jarm. 412. *Doe d. Murch v. Marchant*, 7 Scott, N. R. 644. But "this rule," said *Coleridge, J.*, "must not be acted on so as to clash with another paramount rule, which is that, before all things, we must look for the intention of the testator, as we find it expressed or clearly implied in the general tenor of the will; and when we have found that in evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last indifferently: and this rests upon good reason; for although when there are repugnant conditions, and nothing leads clearly to a performance of one or rejection of the other, convenience is strongly in favour of some rule, however arbitrary: yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was supposed to be the safest guide, under the circumstances, to the last intention of the testator. *Morrall v. Sutton*, 1 Phil. 536. See *Sherratt v. Bentley*, 2 Mylne & K. 157.

[2] "If a party came into a court of justice to enforce an illegal contract, two answers may be given to his demand: the one, that he must draw justice from a pure fountain; and the other, that *potior est conditio possidentis: per Buller, J., Munt v. Stokes*, 4 T. R. 564. Accordingly, if money be paid by one of the parties to an illegal contract to the other, in a case where both may be considered as *particepes criminis*, an action cannot be maintained after the contract is executed to recover the money once paid. 1 Selw. N. P. 90. *Webb v. Bishop*, id. 92. *Browning v. Morris*, Cowp. 792. *Richardson v. Mellish*, 2 Bing. 250: *per Parke, J.* So the premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck v. Hewitt*, 1 East, 96. *Lowry v. Bourdieu*, Dougl. 468. *Andree v. Fletcher*, 3 T. R. 266. *Lubbock v. Potts*, 7 East, 449. *Palyart v. Seckie*, 6 M. & S. 290. *Cowie v. Barber*, 4 id. 16. So where property has been placed in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds and fraudulently or unjustly withholds them, the party aggrieved must abide by his loss. 1 Story, Eq. Jur. p. 69, 4th edit.

The parties will not be in *par delictum* if one has unfairly taken advantage of his position to extort from the other an illegal promise, and has received payment under it: as, where payment in preference to the other creditors has been exacted by a creditor refusing to sign a composition deed without receiving a sum of money: in such a case it has been held that the money so paid might be recovered back. *Atkinson v. Denby*, 30 L. J. Ex. 361. *Smith v. Cuff*, 6 M. & S. 160. *See ante*, p. 158.

CURTESY. *See* Copyhold, *ante*, p. 223.

(A) *The Nature, Incidents, and Effect of Tenancy by the Curtesy.*[1]

[1] Tenancy by the curtesy is created where a man marries a woman seised of an estate of inheritance; that is, of lands and tenements in fee simple or fee tail, and has by her issue born alive capable of inheriting her estate. In this case the husband, on the death of his wife, holds the lands for life, as tenant by curtesy. *See* 2 Bl. Com. 126. This estate is no more than a bare estate for life; nor has this tenant any more privileges than a mere tenant for life. To give an estate by curtesy, four things are requisite:—1st. Marriage. 2d. Seisin of the wife. 3d. Issue. 4th. Death of the wife. 1st. With respect to the marriage, it must be between persons, capable of contracting together, and duly solemnised. But although, where a marriage is void, the man does not acquire a title by curtesy, yet, if it be only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy; for a marriage cannot be avoided by the ecclesiastical courts after the death of either of the parties. 2d. As to the seisin of the wife, or of the husband in her right, it is a circumstance absolutely required, and, with respect to corporeal hereditaments, it must be a seisin in deed. *Doe d. Neville v. Rivers*, 7 T. R. 276. *Buckworth v. Thirkell*, 3 B. & P. 652, n. *Jones v. Davie*, 29 L. J. Ex. 374. Thus, Lord Coke says, if a man dies seised of lands in fee simple, or fee tail general, and they descend to his daughter, who marries, has issue, and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had a seisin in law. But if she or her husband had entered during her life, he would have been tenant by the curtesy. *See* 1 Inst. 29, a. The time when the seisin commences, whether before or after issue born, is immaterial; for, if a man marries a woman seised in fee, is dis-seised, and then has issue, and the wife dies, he shall enter and hold by the curtesy. So if he has issue which dies before the descent of the lands to the wife. *See* id. 30, a. The third circumstance required to the existence of an estate by the curtesy is issue; such issue must, however, have the following qualities to entitle the husband to curtesy:—1st. It must be born alive. 2d. In the life-time of the mother. 3d. Be capable of inheriting the estate. 8 Co. 346. By the old law, it was deemed necessary that the child should not only be born alive, but be heard to cry; and that circumstance was to be proved by persons who actually heard it, not by those who learned it by hearsay. Littleton, however, appears to have doubted whether it was necessary to prove that the child cried; and Lord Coke infers from the form of pleading in cases of this kind that any other evidence would be sufficient. *See* Bract. 438, a; 1 Inst. 29, b; 8 Rep. 34, b; Dyer, 25, b, 1 and 35. The issue must be born in the life-time of the wife; so that if she dies in child-bed, and the issue is taken out of the womb by the Cæsarean operation, the husband will not be entitled to curtesy. For at the instant of the mother's death he was clearly not entitled, as having had no issue born; but the land descended to the child while in his mother's womb; and the estate being so vested shall not be taken from him and his heirs. *See* 1 Inst. 29, b; 8 Rep. 35, a. It is immaterial whether the issue be born before or after the seisin of the wife. But the issue must be such as is capable of inheriting the estate. Therefore, if lands be given to a woman and the heirs male of her body, who has issue a daughter only, her husband will not be tenant by the curtesy. *See* 1 Inst. 29, b; 8 Rep. 35, b. The last circumstance required to give a title to curtesy is the death of the wife, by which the estate of the husband becomes consummate. By the special custom of gavelkind, a husband who survives his wife is entitled to a moiety of her lands, whether he has issue or not, but which, in conformity to the custom of Normandy, is forfeited by a second marriage. Mr. Robinson, in his *Treatise on Gavelkind*, observes, that this was formerly called the man's free bench; and cites a record of 21 Edw. 1, in which this custom is recognised. As to the persons who are capable of acquiring an estate of this kind it will be sufficient to observe, that all those who are capable of taking freehold estates may be tenants by the curtesy. An alien cannot, however, be tenant by the curtesy; for, although he may take an estate by purchase for the benefit of the Crown, yet he cannot take an estate by act of law, for the law will not transfer an estate to a person who cannot keep it, but must immediately give title to another. If an alien be made a denizen, and afterwards has issue, he may be tenant by the curtesy in respect of such issue, though he would not be entitled on account of issue had before. *See* 7 Rep. 25, a; 1 Vent. 417. But persons attainted of felony, or treason, cannot be tenants by the curtesy; for, being *extra legem positi*, they are become incapable of deriving any benefit from the law, and by consequence of this in particular, which intended to give the inheritance only to those who were capable of holding it during their lives. Bro. Ab. Curtesy, 15.

Having shown the origin of curtesy, circumstances required, and persons capable of inheriting such an estate, we must next consider of what things a man may be tenant by curtesy, and what will be forfeiture of the estate. First, as to what things a man may be tenant by curtesy—Estates in fee simple, *see* Bract. 437, b. 8, a; 1 Inst. 30, b; 3 Atk. 423. Tail, *see* 8 Rep. 35, b; 2 Inst.

CURTILAGE. A yard, court-yard, or piece of ground, lying near to a dwelling-house, and included within the same fence. Defined by Spelman as the space included within the enclosure of a court. In its proper legal signification it includes all that space of ground and buildings thereon which is usually enclosed within the general fence immediately surrounding a principal messuage and out-buildings, and yard, closely adjoining to a dwelling-house; but it may be large enough for cattle to be levant and couchant therein. 1 Chit. Gen. Pr. 175; see *ante*, Burglary, p. 3.

CUSTODY. *See* Arrest, vol. i. p. 525; Bail, vol. ii. p. 74; *post*, Deposit in lieu of Bail; Detainer; Evidence; Sheriff.

CUSTOM. *See* Common, *ante*, p. 143; Copyhold, Estate of, *ante*, p. 222; *post*, Descent; Distribution; Easter Offering; Executors and Administrators; Ferry; Prescription; Tithes.

CUSTOM: Admissibility of Evidence of to Explain Document. *See* Ambiguity, vol. i. p. 320; Contract, *ante*, p. 200; *post*, Evidence.

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336. In coparcenary—Trust, *see* 2 Saund. 46. Money to be laid out in lands, *see* 2 Vern. 536; 1 Ves. 174; 3 Bro. Rep. 404. Equities of redemption, *see* Ca. Temp. Hard. 399. And incorporeal hereditaments, 6 Co. 68. But estates not of inheritance are not liable to curtesy, *see* 9 Mod. 147; 2 Atk. 47; 1 Inst. 29, a; nor copyhold (*see* Copyhold, Estate of); nor lands assigned for dower; nor estates in joint-tenancy; nor remainders and reversions, *see* 1 Inst. 29, a; 2 and 75; 2 Saund. 46, n. q.; Smith, R. & P. 173; and 3 & 4 Wm. 4, s. 22.

Secondly, as to what will be a forfeiture of the estate. Alienation by a tenant by the curtesy in fee, or in tail, or for the life of the grantee, is a forfeiture. *See* stat. of West. 2, c. 24. But a husband does not forfeit his right to an estate by the curtesy, by leaving his wife and living in adultery with another woman. *See* 3 P. Wms. 276. It appears to have been doubtful whether a tenant by the curtesy was punishable at common law for waste. It was, therefore, enacted by the 6 Edw. 1, c. 5, that a writ of waste might be brought against him, and that he should incur the same penalties for committing waste as any other tenant for life. *See* 3 Inst. 301; 2 Bac. Abr. 230.

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I. Relative to the Definition of a Custom, and Distinction between it and a Prescription.

Anon. 3 Salk. 112.

A custom is an unwritten law, established by long usage. The adoption of a certain rule or method gives it the power of a law; and if it be universal, then it is common law; if particular or confined to a local district, then it is a custom. The difference between a custom and prescription is, that the former is local, as prevailing in a certain province, county, hundred, &c.; and the latter personal, being applicable to a certain person and his ancestors, or to a body politic and their predecessors. *See* Co. Litt. 13, b; 6 Co. 69; 8 id. 62; 2 Bulst. 206; Rol. Rep. 46; and *post*, Prescription. As where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his privilege, a grant is presumed, and the right must therefore be claimed by prescription; but when the claim depends upon a general rule of property within a certain district, it must be described as a custom, or *lex loci*. *See* 5 T. R. 412, n.

A custom[1] is founded upon usage, and is local; a prescription, personal.

II. Relative to the Creation of a Custom.

Time and usage are essential to the creation of a custom, for no custom can be legal but such as has been used time out of mind. *See* Co. Litt. 110, 113. Four properties are essential to the existence of a custom: viz. a reasonable commencement; to be certain; to have a continuance; and not to be against the king's prerogative. *Anon.* 3 Salk. 112; 3 Mod. 134; id. 293.[2]

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[1] It is difficult to trace the commencement of customs. They owe their origin to the doing of a reasonable or beneficial act, which from constant, immemorial, and uninterrupted usage, becomes a custom, and obtains the force of a law, so as to bind the particular places, persons, and things connected with it. *See* 1 Bac. Abr. 670.

[2] A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to investigate its origin; but in the case of prescription, which founds itself upon the presumption of a grant which is supposed to have been lost in process of time: for no prescription can have had a legal origin where no grant could have been made to support it. Thus, a custom for all fishermen to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84, and yet a grant of such an easement to

III. Relative to the General Requisites and Subject-matter of a Custom.

(A) *In General.*

(*a*) *As to being Reasonable.*

Anon. 3 Salk. 112; S. P. 4 Mod. 342.

It is no objection to a custom that it is against common right, provided it be reasonable;

It was resolved, that a custom shall not be taken to be unreasonable because it is contrary to the common law; for the customs of gavelkind and borough English are contrary to the common law, and yet they are allowed to be good. Neither is a custom unreasonable for being injurious to private persons or interests, so as it tends to the public and general advantage of the people.

(*b*) *As to being Convenient.*

Convenient;

Customs, to render them valid, must be convenient. *See* 12 East, 22; 13 id 367; 10 Mod. 133; 7 id. 29; 2 And. 152; Hob. 329; 1 Com. 274, n.; 2 Ld. Raym. 777.

(*c*) *As to being Certain.*

Naylor v. Scott, 2 Ld. Raym. 1558; 1 Barnard, 159.

And certain.

This was a custom, that every inhabitant, keeping a house and having a family in W., and having a child or children born in that parish, at the time of churching the mother of the child, or at the usual time when she should be churched, should pay tenpence to the vicar of the parish for, or in respect of, such churching. The court were of opinion that it was a void custom, because it was not alleged what was the usual time the women were to be churched, and therefore uncertain, and void for unreasonableness.

Clarkson v. Woodhouse, 5 T. R. 412, n.

A custom, the extent of which is measured by "reasonableness," is sufficiently certain.[1]

It was resolved in this case that a custom, the extent of which was measured by reasonableness, was sufficiently certain.

(*d*) *As to being Contrary to Statute.*

Noble v. Durell, 3 T. R. 271.

A custom contrary to statute cannot be supported; therefore, a custom that every *pound* of butter sold in a market shall weigh 18 *ounces*, is unsustainable.

On demurrer to a plea, stating a custom in Southampton, that every pound of butter exposed to sale in the said markets of the town should be and ought to weigh eighteen ounces. It was contended that the custom was contrary to the law of the land and statutes, which direct that every pound should contain sixteen ounces. 9 Hen. 3, c. 25; 14 Edw. 3, st. 1, c. 12; 27 id. st. 2, c. 10; 31 id. st. 1, c. 2; 13 Rich. 2, c. 9; 15 id. c. 4; 8 Hen. 6, c. 5; 11 Hen. 7, c. 4; 12 id. c. 5. And,

Per Cur. We are not called upon to decide whether a custom to sell butter in lumps of any particular weight is good or not; that question will remain

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fishermen within the district *eo nomine*, might well be held void. *Lockwood v. Wood*, 6 Q. B. 64.

A custom is not unreasonable because it is prejudicial to the interests of a private person, if it be for the benefit of the commonwealth; as the custom to turn the plough upon the headland of another in favour of husbandry, or to dry nets on the land of another in favour of fishing, and for the benefit of navigation (*Tyson v. Smith*, 9 Ad. & E. 421. *Lord Falmouth v. George*, 5 Bing. 286): or to take water from his well. *Race v. Ward*, 4 E. & B. 702.

[1] But an usage entitling poor and indigent householders resident in A. to rotten boughs and branches in a certain chace cannot be sustained, since the description of the parties entitled is too uncertain. *Selby v. Robinson*, 2 T. R. 758. So a custom that an infant may sell his land when he can measure an ell of cloth is void for uncertainty. *See* 3 Mod. 290; 1 Roll. 10.

undetermined notwithstanding the present decision. Here the question is: whether, when a person is selling butter under the specific denomination of a pound, he shall be compellable to sell more than a pound. Butter is described to be sold by avoirdupois weight, by which a pound consists of sixteen ounces; then, how can a person who professes to sell a pound of butter be obliged to sell more than a pound? It might as well be argued that a custom might prevail in a particular place that a less number of days than seven should make a week, or that a less space of ground than an acre should be an acre. Such a doctrine would be absurd. We are of opinion that this custom is clearly void.

(*e*) *As to being Contrary to the Common Law.*

BECKWITH v. HARDING, 1 B. & A. 508. ANON. 7 Mod. 29.

A custom must not be contrary to the common law; hence a custom for churchwardens to affix monuments against the walls of a church, without the consent of the rector or the ordinary, is void.

The validity of a custom, that the churchwardens of a certain parish have had full right to enter into the parish church and there erect monuments, tablets, tomb-stones, and grave-stones, to the memory of deceased persons, at the free will and pleasure of such churchwardens, now came into question in the form of an action of trespass brought by the plaintiff, as rector, against the defendant, for erecting a tablet without the consent and against the will and remonstrance of the plaintiff, under the directions of the churchwardens.

Per Cur. The freehold of the church is generally in the rector, and there is nothing in this case to show that the freehold is divested out of him. The circumstance of the parishioners repairing the chancel will not have that operation; for though they always repair the church, yet the freehold of it still remains in the parson. The very form of induction shows the interest the parson takes in the church, for he is inducted into the real, actual, and corporal possession of the church, with the rights, profits, and appurtenances thereto belonging. Thus there is a custom claimed for the churchwardens to fix in the church any monument, tablet, or inscription, without any ecclesiastical control whatever. It is, however, against the general rule, which requires the consent of the ordinary, and is, therefore, bad. The establishment of such a custom would be in effect to secularise the church. But, even assuming that such custom might be good without the parson's leave, it can never be supposed that it can be upheld unless subject to the consent either of the rector or the ordinary. — Judgment for the plaintiff.

(B) *In Particular.*

(*a*) *For Profits* in alieno solo.

GRIMSTEAD v. MARLOWE, 4 T. R. 717.

An usage for every inhabitant of an ancient messuage within a parish to take a profit *in alieno solo* is bad.

To an action of trespass for breaking and entering the plaintiff's close. The defendant pleaded that the *locus in quo* was part of an ancient common, and then justified under a custom for every inhabitant residing in any messuage within the parish of L. for the time being, &c. to have common of pasture, &c. To which there was a demurrer.

Per Cur. Where a plaintiff in possession brings case against a wrongdoer, it is sufficient to declare generally without disclosing any title. But where it becomes necessary to justify under a right in a plea, such right must be set out formally; the privilege which is claimed in this case is to take a profit *in alieno solo*, but that, according to *Gateward's case*, 6 Rep. 596; *Hardy v. Hallyday*, cited in *Grimstead v. Marlance;* cannot be claimed by custom. There may be a custom for an easement as a right of way *in alieno solo*, but for a profit *à prendre* the party must prescribe in a *que* estate.

(*b*) *For Easements* in alieno solo.

FITCH v. RAWLING, 2 H. Black. 393.

An usage for

To trespass for entering a close, the first plea stated that, by custom, all

all the inhabitants of a parish to play at all lawful games and sports in a particular close, at all reasonable times, is legal; but a custom for *all persons* being in the parish to possess a similar privilege is illegal.[1]

the inhabitants for the time being of the parish of S. have, from time immemorial, been used and accustomed to have, and of right ought to have, the liberty and privilege of exercising and playing at all kinds of lawful games, sports, and pastimes, in and upon the said close, in which, &c., at all seasonable times of the year, at their free will and pleasure; and the second plea alleged the usage to be, for all persons for *the time being in the said parish* to have the liberty and privilege of exercising and playing at all kinds of lawful games and sports, in and upon the *locus in quo* at all seasonable times. After verdict for the defendant motion was made in arrest of judgment, on the ground that the customs could not be supported.

But the court said the custom disclosed in the first plea is good. It has been objected that it is not alleged that the pastimes were allowed for the necessary recreation of the inhabitants, nor that the defendant Chatteris went into the close in question for his recreation. But the case in 1 Lev. 176, decides that it is necessary for the inhabitants to have such recreation; if so, it is a matter of law; and though there may be precedents which state such customs to be for either the health or recreation of the inhabitants, yet when the court lay it down that recreation is necessary, it is not required to be averred in pleading. But the custom unfolded in the second plea is as untenable as the other is tenable; because what is there stated may be claimed by all the inhabitants of England. Customs must be in their nature confined to individuals of a particular description, and within a certain district.

(*c*) *For Tenants to have the Way-going Crops.*

Wigglesworth v. Dallison, 1 Dougl. 201.

A custom that tenants shall have the way-going crop after the expiration of

The following custom was proved, "that every tenant and farmer of any lands within the parish of H., for any term of years which expired on the first day of May, in any year, had been used and accustomed, and of right ought to have, take, and enjoy, to his own use, and to reap, cut, and carry away, his way-going crop; that is to say, all the corn growing upon the said lands which

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[1] In cases of this description, all times of the year would be understood to mean only legal and reasonable times of the year. *Millechamp v. Johnson*, Willes, 205, n. And what are reasonable times is a question partly of law and partly of fact; hence a party cannot justify a trespass under a custom for all the inhabitants of a town to walk or ride over a close at all seasonable times of the year, if it appear that the trespass was committed when the corn was standing. *Bell v. Wardell*, id. 202.

The reason why a profit *à prendre* cannot be supported by a custom in an indefinite number of people is, that the subject of the profit *à prendre* would in that case be liable to be entirely destroyed.

Customs derogating from the general right of property must be construed strictly, and, above all things, they must be reasonable. *Rogers v. Brenton*, 10 Q. B. 57.

The custom to erect booths in a highway during a fair has been held legal. Such custom was, in substance, for every victualler to enter upon any part of a certain close within a borough (within which there was a fair immemorially held for three weeks), but leaving sufficient part of such close open for use as a public highway, and for the more conveniently carrying on their trade during the fair, to erect booths and keep goods there till the fair was ended, paying to the owner of the soil a reasonable compensation for the use thereof. *Ellwood v. Bullock*, 6 Q. B. 383.

A custom for all the inhabitants of B., as such, to enter the close of the plaintiff, and take fish there without limit, is bad. *Lloyd v. Jones*, 17 L. J. C. P. 206; 12 Jur. 657.

A custom was found as follows:—That any tinner within Cornwall may acquire a right to the tin within certain limits, taking proceedings in the Stannary Court, of which the landlord has notice, and completing his title in that court, and in case of minerals being found, rendering a portion of the produce to the lord or owner of the soil; and that the right so acquired may be reserved by an annual renewal of the bounds; and that it is not necessary for its preservation that the minerals (if any) within the limits should be sought after, and the land worked for mineral purposes by the boundowner or on his behalf. The court held the custom as found to be bad and unreasonable; but they said that if the right had been qualified by the imposition of a duty annexed to its continuance, that the boundowner should search for tin, and work the land for mineral purposes, it would be good. *Rogers v. Brenton*, 10 Q. B. 26; 17 L. J. Q. B. 34.

had, before the expiration of such term, been sown by such tenant, upon any part of such lands, not exceeding a reasonable quantity thereof, in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which had been left standing and growing upon such lands at the expiration of such term of years." On a motion in arrest of judgment, three objections were made on the part of the defendant; viz. 1st. That the custom was unreasonable. 2dly, That it was uncertain. 3dly, That it was repugnant to the deed under which the plaintiff had held, the demise not being by parol.

their terms, is good.[1]

Per Cur. We are all of opinion that the custom is good. It is just; for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed, does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease.— Rule discharged. *See post*, Fixtures; Landlord and Tenant; and *Dalby v. Hirst*, 1 B. & B. 224; S. C. Moore, 536.

(*d*) *In relation to Members of a Corporation.*

Where a corporation is entitled to a customary duty on corn imported, a custom, that factors, free of the corporation, shall receive to their own use that part of the duty which arises from corn consigned to them as factors, is good in law. *Cocksedge v. Fanshaw*, 1 Dougl. 119, abridged *post*, London.

(*e*) *Imposing a Charge on Ships Laden, &c.*

HASPURT v. WILLS, 1 Mod. 47; 2 Keb. 624; 1 Vent. 71; 1 Sid. 454.

A custom, that all ships passing by a certain wharf shall pay a duty, is bad in the absence of a consideration for the payment;

Action on a custom for wharfage. The declaration set forth that the plaintiff had a common wharf, and a crane to it; and that all goods brought down the river and passing by, shall pay such a duty. It was objected that the custom was bad, because it is for "toll through," which is *malum tolnetum*, and cannot be levied without showing a consideration. And of that opinion were the court. *See post*, Tolls; Wharf.

WARREN v. PRIDEAUX, 1 Mod. 105; Ld. Raym. 232; Keb. 249; 1 Freem. 335; 2 Lev. 96.

And even though there be a consideration, the validity of such a custom seems questionable.

A custom for toll, in consideration of maintaining the quay, and keeping a bushel to measure salt. The toll was a bushel of salt out of every ship laden with salt coming into S.

Per Cur. The custom is laid to have a bushel of salt of every ship that comes within S. If a ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that ship pay? If any man will prescribe for a toll upon the sea, he must allege a good consideration; because, by statute, every one has a liberty to go and come on the sea without impediment.

(*f*) *To have Surveyors of Victuals within, &c.*

[1] Where a custom of the county is proved to exist, it is to be considered applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms of the contract. *Wilkins v. Wood*, 17 L. J. Q. B. 319; 12 Jur. 582. *See* Landlord and Tenant.

VAUGHAN v. ATWOOD, 2 Mod. 56; 1 id. 202. PALMER v. BARFOOT, 2 Lutw. 1374.

A custom to choose surveyors to take care that no unwholesome victuals are sold within, &c., with power to destroy, &c. is good.

Trespass for taking beef. The defendant pleaded a custom to choose supervisors of victuals at a court-leet; that he was there chosen, and having reviewed the plaintiff's commodities found the beef to be corrupt, which he took and burned. The plaintiff demurred, for that the custom is unreasonable; and when meat is corrupt and sold, there are proper remedies at law, by action on the case, or presentment at a leet, and cited 2 Hen. 6, 53; 11 Edw. 3, 4, 6; and stat. 18 Eliz. c. 3. But the court held the custom good, and defendant had a judgment.

(*g*) *To Grind Corn at a certain Mill.*

CORT v. BIRKBECK, 1 Dougl. 218. DRAKES v. WIGLESWORTH, Willes, 654.

A custom, that "all the inhabitants of a manor shall grind all their corn, grain, and malt, which by them shall be used or spent, ground within the manor, at a certain mill," is good.

In case, the declaration stated that the plaintiff was possessed of certain corn-mills within the manor of S., and entitled to toll. That, during all the time of his possession, all the tenants, inhabitants, and residents within the manor, ought to have ground all their corn, grain, and malt, which by them should be used or spent, ground within the manor at the plaintiff's mills, and not elsewhere; but that the defendant did, knowingly, &c. use and spend, ground within the said manor, divers large quantities of corn, grain, and malt, of the defendant, which had been ground elsewhere than at the plaintiff's mills. It was objected to the validity of the custom, that the words in which the custom was stated would amount to a prohibition of their using flour, &c. not made at the plaintiff's mills, even if they received it as a present or in charity.

But the court said, a doubt has arisen on the extent of the custom, whether it goes only to corn growing in the manor, and ground there, or to all ground corn, wherever it may grow, which is consumed within the manor; but we think it is clearly good if restrained to corn grown within the manor.—Judgment for the plaintiff. *See* Brownl. Ent. 63; Hob. 189; 2 Saund. 112; Vent. 288; Plowd. 410; *post*, Mills.

(*h*) *Regulating Parishes.*[1]

BURTON v. WILEDAY, And. 32.

Where a parish consists of four vills, a custom, that the inhabitants of one of them shall pay two-thirds, and the other three one-third to the church-rates, is good.[2]

In a prohibition, the plaintiff stated that M. is an ancient parish, having an old parish church, and consisting of one vill, called A., and three other vills, and sets forth a custom to make a general rate to reimburse the churchwardens their expenses; and for the inhabitants of A., by a particular levy, to raise two-thirds of such rates, and the inhabitants of the three other vills, by a particular levy, the other one-third. That a rate was made by the parishioners for reimbursing the sum of 19*l.*, laid out by the defendants, the churchwardens, in repairing the church; and the said three vills were rated as above, one-third. The court held the custom a reasonable one.

(*i*) *Recognising Torts.*

No custom can authorise the commission of a tort or trespass. *See* Cro. Jac. 80; 1 Com. 274, n.; 2 Ld. Raym. 777.

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[1] A custom or prescription in *non decimando* by a hundred is good, but not by a parish or particular town (*see* March. 25, pl. 59); so a custom in respect to tithes to have all the lands of a particular parish reckoned together as one man's is void (Hob. 329); or for a parish to take fees for the burial of a dead person carried through the parish and buried elsewhere (id. 175); or for churchwardens to dispose of seats in a church. 2 Lev. 241.

[2] So a custom, that churchwardens shall account to twenty-four parishioners, is valid. *Batt v. Watkinson*, 2 Lutw. 436.

A custom would be bad which required a township part of a parish to pay a proportion of church-rate without requiring the inhabitants of the parish to be summoned to consider the rate. *Reg. v. Dalby*, 3 Q. B. 602.

(*j*) *Being in Restraint of Trade.*

THE MAYOR OF WINCHESTER v. WILKS, 6 Mod. 21; 1 Salk. 203; 3 id. 349; Holt, 187; 2 Ld. Raym. 1129.

A custom in restraint of trade,[1]

In case against the defendant for using the trade of a woollen-draper within the corporation, in opposition to a custom that none who had not served seven years to a trade, or had been free of the Guild of Merchants, should use it within the corporation; this custom was not sanctioned by any by-law.

Holt, C. J., said it was a point not determined, whether such a custom was good. But, judgment being stayed on account of defects in the declaration, the court declined giving any opinion on the merits, which they said was a question of great consequence. *See* Cro. Eliz. 803; 1 Leon. 262; 2 Lev. 33; 11 Co. 53; Palm. 1; 1 Salk. 193; 6 Com. Dig. Trader (b 2).

(*k*) *Being in Restraint of Marriage.*

RICHARDS v. DOVEY, Willes, 622.

or marriage, is illegal.

A custom that every man, being a parishioner, inhabitant, or resident, within the parish of B., who shall marry a woman either residing in that or any other parish, which marriage shall be solemnised by virtue of a license in any other church, chapel, or place, and not in the said church in the parish of B., shall pay 5*s.* to the rector. On demurrer to the declaration, the court held the custom void.

IV. RELATIVE TO THE PERSONS BOUND BY A CUSTOM.

FITCH v. FITCH, 2 Esp. 543.

A customary right accruing to inhabitants of a parish, applies to a party[2] who rents a tenement in the parish, which he only occasionally uses.[3]

To trespass for entering the plaintiff's close, the defendant pleaded, in justification, a custom entitling the inhabitants of the parish of B., in which the *locus in quo* lay, to enter the said close at all seasons of the year to play at all lawful games and pastimes; that he, as such inhabitant, entered, &c. and committed the said supposed trespass in playing, &c. as he lawfully might. To prove the inhabitancy, it was shown that the defendant's father rented a butcher's shop in the parish of B., and that he, the defendant, resorted thereto twice in every week to vend their meat. It was contended that this evidence was inadequate to support the right; but *Heath, J.*, said, that the evidence

[1] As a custom that a party shall not use a trade in a particular city is void, unless it be founded upon some consideration. *See* Sty. 111; 2 Lev. 210; 3 id. 241. But a custom which restrains trade *sub modo* may be good, and therefore the custom of foreign bought and foreign sold, whereby a man not free of a city, &c. will be restrained from buying or selling goods to other foreigners within such city, &c. is good. *See* Dyer, 279; R. Jon. 162; 2 Roll. 202; Say. 255; O. Bridgm. 291. So a custom that none shall use the trade of a dyer in such a town, without the license of the archbishop, is good. *See* 8 Co. 125. So a custom that a butcher shall not sell meat in his own house upon a market-day in a town where the place has a market, but must sell meat upon a stall in the open market, is tenable. *See* id. 127, a.

[2] All customs have their obligation from the consent, either express or implied, of the parties who are to be bound by them. *See* T. Jones, 144. But customs which bind private persons do not extend to the king. *See* Plow. 205, a; Co. Litt. 15, b; Raym. 77; Tid. 138. As if a man has toll by prescription, this extends not to the Crown. *See* Dav. 33, b.

A custom may extend to and give (*see* 5 Hen. 7, c. 41; Fitz. Custom, 9; 9 Co. 76) an infant a power of doing that which, by the rules of the common law, he could not do; as an infant at the age of fifteen may make feoffment of lands (*see* 9 Hen. 6, c. 7, 8; Bro. Custom, 63) of the nature of gavelkind (*see* Lamb, 624); but this, like all other customs, is to be construed strictly, and in such manner as that no prejudice may accrue to the infant thereby, and therefore such feoffment must be for (*see* 9 Hen. 6, c. 7, 8) valuable consideration; must be made in (*see* Lamb, 628) person, and not by attorney; cannot be with (*see* Roll. Abr. 568) warranty; must be of lands which (*see* Bendl. 33, pl. 52) descended to him in gavelkind, and not of lands by purchase; and must be of lands in possession, not in remainder or reversion. *See* Bendl. 33.

[3] And a custom which extends to the

adduced was sufficient to establish the right claimed; and observed, that the present case was similar in principle to a claim of a right to a pew in a church, or to draw water from a well, either of which cases would be supported by this evidence.

V. Relative to the Construction of a Custom.

King v. Dilliston, 3 Mod. 224.

Customs tending to destroy an estate must be construed strictly;[1]

Per Cur. All customs are to be taken strictly when they go to the destruction of an estate.

See Cro. Eliz. 879.

Rex v. Grosvenor, 7 Mod. 198. Rex v. Powell, 8 Mod. 291.

And they will not be interpreted to control a charter.

A charter regulated the mode of election of corporate officers. A *quo warranto* disclosed a custom altering the form of election. And the court were of opinion that no usage could control the direction of a charter, all customs in contradiction to a charter being void.

VI. Relative to being Good in Part and Void as to the Residue.

Wilkes v. Broadbent, 2 Stra. 1224.

A custom cannot be good in part, and void as to the residue.

A custom that where a customary tenant of a manor has coal-mines lying under the freehold lands of other customary tenants within the manor, he may make pits in those lands to get the coals, &c., may lay the coals when got, &c. and the earth, &c. on the land near to such pits, such lands being customary tenements, &c. there to remain and continue (not saying how long, or for a convenient time); may lay and continue wood there for the necessary use of the pits; may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure. The court of Common Pleas held it void. And, on a writ of error to the K. B., the court confirmed the judgment of the C. P. on the ground that the custom was bad in part, and, being bad in part, it was void for the whole.

But *see* 6 Mod. 123; Holt, 433; 1 Salk. 143; Willes, 384; 10 Mod. 338; 1 Stra. 462.

VII. Relative to Trying the Validity of a Custom.[2]

Welby v. Herbert, 2 Lev. 163, n.; 3 Keb. 606. Wise v. Creeke, 2 Lev. 187. Hodgson v. Atkinson, 2 Com. 602.

Customs are triable at common law, and not in the spiritual court.

The plaintiff declared upon a prohibition to a suit in the spiritual court that all customs are triable at common law, and that the defendant sued him in the spiritual court. To which the court assented.

VIII. Relative to the Recovery of the Forfeiture occasioned by the Breach of a Custom.[3]

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suburbs of a city is not on that account illegal. *Hains v. Wakeman*, Sayer, 254.

[1] Hence a custom to bar an estate in fee for default of claims after proclamations, extends not to a remainder expectant upon an estate for life, but shall be taken strictly. Cro. Eliz. 879; S. C. 1 Saund. 146, 348.

General customs may be extended to *new things* which are within the reason of those customs (*see* Ld. Raym. 499; 12 Mod. 271; 5 Co. 82; 2 Jon. 204); and it is a universal rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing. *See* 11 Mod. 160; Fitzgib. 243.

[2] Persons formerly who claimed the same right as the plaintiff or defendant were not competent witnesses. Now the objection only goes to their credit, and is no ground of exclusion.

[3] Assumpsit or debt lies for money forfeited by the breach of a custom. *See* 2 Lev. 253. Or a distress in some cases. *See* Distress; and *post*, p. 441.

PEARSON v. RIDDLEY, Raym. 204.

A custom directed the inhabitants of A. to send a constable to the leet, and in default thereof to pay a fine; A. having neglected to appoint a constable, the steward of the leet imposed a fine and distrained. It was contended that a distress for the fine was incident to the custom. But the court said, when a duty is raised by custom, a distress for that duty must be maintained by a corresponding custom.

A distress for the breach of a custom must be founded on a corresponding custom,[1]

MOIR v. MUNDAY, Say. 181.

By a custom of A., if a person not a freeman exposed goods to sale, except in markets, he forfeited 6*s.* 8*d.*; and by another custom, all the goods exposed to sale might be distrained until the penalty is paid.

Per Cur. We are of opinion that the custom to distrain all the goods is bad. If the custom had been to distrain such of the goods as should be sufficient to satisfy the penalty, it would have been unobjectionable; but, according to this custom, a diamond worth 1000*l.* might be distrained for the penalty of 8*s.* 6*d.*

And be reasonable; therefore, a custom to distrain goods of great value for a small penalty is void.

IX. RELATIVE TO THE PLEADING OF A CUSTOM.

MAYOR OF WINTON v. WILKS, 2 Ld. Raym. 1134. TITUS v. PERKINS, Skin. 250. ROGERS v. BRADLEY, 2 Vent. 144. CARTER v. DOWRISH, Carth. 83.

Per Cur. A declaration on a custom ought to set out specially the nature and particulars of the custom.

See And. 32.

Customs must be pleaded specially.[2]

X. RELATIVE TO THE EVIDENCE OF A CUSTOM.

To establish a custom, reputation that it exists is not sufficient; evidence of its having been put in use must be given (*see* 1 T. R. 466); and a single act undisturbed will not make a custom, though it will be evidence of a custom. *See* 2 M. & S. 93.[3]

XI. RELATIVE TO THE EXTINCTION OF A CUSTOM.

BOLUS v. HINSTORKE, T. Raym. 192.

On motion in arrest of judgment it was argued that unity of possession did

A custom is

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[1] If the penalty for which a distress may be made is to be paid to the two bailiffs of a corporation, one of the bailiffs may distrain for it. Say. 183.

[2] Otherwise the courts will not notice them (*see* Fort. 347); and they ought to be pleaded with precision as to the extent, place, &c., and in the present tense, and not that they should have a way, &c. *See* 1 Sid. 237.

And in pleading a custom which admits of exceptions, the exceptions must be noticed. *Griffin v. Blandford*, Cowp. 63. But modifications of a custom, not inconsistent with the right claimed, need not be shown. *Ball v. Herbert*, 3 T. R. 264. So, where a copyholder under custom claims common, it is not necessary to show what estate he has in the copyhold. *Hoskins v. Robins*, 2 Saund. 326.

If a customary right be claimed as appurtenant to an ancient messuage, the antiquity of the messuage is, as a part of the custom, put in issue by a traverse of the custom. *Dunstan v. Tresider*, 5 T. R. 2.

And a custom, though apparently subsequent to another, may be laid as founded time out of mind, for customs are not coeval. *Lovelace's case*, 1 Salk. 203. And if an insufficient reason for the custom be shown in pleading, yet it will be sufficient on demurrer, if the custom be good on the face of it.

[3] Legal memory dates from the first year of the reign of Richard the First; but even before the 2 & 3 Wm. 4, c. 71 (*see* Easement; Prescription), it was not necessary to produce evidence extending over so long a period of the existence of a particular custom in dispute. From proof of the enjoyment of a custom for a much less period, *ex. gr.* for so short a time as twenty years, a jury has, in the absence of evidence to the contrary, been held justified in finding that the custom had existed immemorially. *Jenkins v. Harvey*, 1 C., M. R. 877. *Master-Pilots of Newcastle-on-Tyne v. Bradley*, 2 E. & B. 428; 21 L. J. Q. B. 196. *Duke of Beaufort v. Smith*, 4 Ex. 450.

destroyed by unity of possession.[1]

not extinguish a custom. But the court said it had been often decided that unity of possession had that effect.

CUSTOMS and EXCISE.[2] *See* Information; Shipping.

I. Officers of are Exempt from Serving on Juries, p. 542.

II. Responsibility of Officers of for Acts done in Discharge of their Duties, p. 542.

III. Actions against Officers of, p. 543.

(A) *The Plaintiff Suing an Officer for anything done in execution of his Office must give One Month's Notice of Action*, p. 543.

(*a*) *And in default the Defendant will be entitled to a Verdict, with Costs, at the Trial*, p. 543.

(B) *And the Defendant may thereupon tender Amends, and entitle himself to the Verdict, if such Tender should afterwards be found sufficient*, p. 543.

(C) *The Defendant may, if no Tender, or an insufficient Tender, has been made, pay Money into Court, with leave of the Court*, p. 544.

(D) *The Action must be brought within Two Months; and the Defendant may give Special Matter in Evidence under the General Issue, and is entitled to Costs if successful*, p. 544.

(E) *The Plaintiff Suing in a Superior Court has no Costs where the Damages do not exceed 20l., unless the Judge certify, or the Court or Judge make an Order*, p. 544.

(F) *A Party complaining of the Illegal Seizure of any Boat, &c., may proceed in the County Court*, p. 545.

I. Officers of are Exempt from Serving on Juries.[3]

II. Responsibility of Officers for Acts done in Discharge of their Duty.[4]

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[1] A custom is not destroyed by disusage for twenty or thirty years, especially where there is no necessity of showing the continuance of the custom. *Mayor of Colchester v. Goodwin*, Carter, 118. Neither is its existence incompatible with the fact that the Crown was at one time seised in fee of the place to which the custom applies. *Drake v. Wiglesworth*, Willes, 654. It has been said, that if contrary to reason, a custom will not prevail, notwithstanding an act of parliament may have recognised it as an existent custom. —— *v. Hamburgh Co.* 1 Mod. 211.

A custom may, of course, be extinguished by statute; as where a statute directs a different mode of election than that sanctioned by the custom. *Mayor of London v. Gatford*, 2 Mod. 39.

[2] If an action relating to the revenue of the Crown be brought in the Queen's Bench or Common Pleas, the Court of Exchequer, upon the motion of the Attorney-General, without affidavit, will remove the cause into their court. *Adams v. Fremantle*, 2 Ex. 453. *Smith v. Cameron*, 9 Jur. 405.

[3] Officers of customs or excise are exempt from serving as jurors. *See* 6 Geo. 4, c. 50, s. 2.

[4] Revenue officers acting under an authority given them by statute to examine goods and merchandise in order to ascertain the amount of duty payable upon them, or whether they are goods that may lawfully be imported, are not liable to an action for the seizure or the unlawful detention of the goods, unless the goods are taken and kept an unreasonable time, and there has been a clear abuse of authority upon the part of the officers. Add. on Torts, 559. If such officers, in the fair and honest belief that goods are liable to seizure, take and detain them, and the matter is referred to the proper authorities, they are not responsible for the detention of the property, although it may turn out that their judgment in the matter was erroneous, and that the goods ought to have been examined and passed. *Jacobsohn v. Blake*, 7 Scott, N. R. 78; 13 L. J. C. P. 89.

It has been held that an action was maintainable against a collector of customs for

III. Actions against Officers of.

(A) *The Plaintiff suing an Officer for anything done in Execution of his Office must give One Month's Notice of Action.*

The plaintiff suing an officer for anything done in execution of his office must give one month's notice of action.

By 16 & 17 Vic. c. 107, s. 313, "no action or suit shall be commenced against any officer of the army, navy, marines, customs, or excise, or against any person acting under the direction of the Commissioners of Customs, for anything done in execution of or by reason of his office, until one month next after notice in writing shall have been delivered to him, or left at his usual place of abode, by the attorney or agent of the plaintiff, in which notice shall be clearly stated the cause of action, the name and place of abode of the plaintiff, and the name and place of abode or business of such attorney or agent, and the attorney or agent mentioned in such notice shall be entitled to a fee of ten shillings for preparing and serving such notice; and if any action or suit shall be commenced against any such officer or other person, and no such notice shall have been given, such officer or other person may call upon the plaintiff to establish to the satisfaction of the court, on affidavits on both sides, that such action or suit is brought for some act, matter, or thing, not done in the execution of or by reason of his office; and if the plaintiff shall fail so to satisfy the court, such action or suit shall discontinue: provided always, that if the plaintiff shall so satisfy the court, he shall not be allowed, on the trial of such action, to give evidence of any cause of action other than such as shall have been disclosed in his said affidavit."

(*a*) *And in default the Defendant will be entitled to a Verdict, with Costs, at the Trial.*

By 16 & 17 Vic. c. 107, s. 314, "upon the trial of any action brought in pursuance of such notice, the plaintiff shall not be entitled to a verdict without proving on the trial that such notice had been duly served, and in default of such proof the defendant in such action shall receive a verdict with costs; nor shall any such plaintiff be at liberty to produce any evidence of any cause of action, except such as has been distinctly stated in such notice."

(B) *And the Defendant may thereupon tender Amends, and entitle himself to the Verdict if such Tender should afterwards be found sufficient.*

And the defendant may thereupon tender amends, and entitle himself to the verdict if such tender should afterwards be found sufficient.

By 16 & 17 Vic. c. 107, s. 315, "it shall be lawful for any officer, or other person to whom such notice shall be given, at any time within one month after service of such notice as aforesaid, to tender amends to the plaintiff or his agent or attorney; and in case such amends be not accepted, to plead such tender in bar of the action, together with the plea of 'not guilty,' and other pleas, with leave of the court, where such leave must be obtained pursuant to the Common Law Procedure Act, 1852; and if, upon the trial of such action, the jury shall find the amends so tendered sufficient, they shall give a verdict for the defendant; and in such case, or in case the plaintiff shall be nonsuited or discontinue his action, or in case judgment be given for such defendant on demurrer, then such defendant shall be entitled to the like costs as he would have been entitled to if he had pleaded the general issue only: but if on issue joined the jury shall find that no amends were tendered, or that the same were insufficient, or shall find against the defendant on such plea or pleas, then they shall give a verdict to the plaintiff, and such damages as they shall think proper, together with costs of suit."

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refusing to accept the amount of duty on tobacco which was tendered to him, and to sign a bill of entry of the tobacco, it being his duty to have signed a bill of entry as a receipt, and which operated as a warrant for the delivery of the goods. *Barry v. Arnaud*, 2 D. & P. 633. See *Legge v. Boyd*, 8 Dowl. 272; 6 Bing. N. S. 240.

(C) *The Defendant may, if no Tender, or an insufficient Tender, has been made, pay Money into Court, with leave of the Court.*

The defendant may, if no tender has been made, pay money into court, with leave of the court.

By 16 & 17 Vic. c. 107, s. 306, "in case any such officer or other person as aforesaid shall neglect to tender amends, or shall not have tendered sufficient amends before the action brought, it shall be lawful for him, by leave of the court in which such action shall be brought, at any time before the trial of the said action, to pay into court a sum of money by way of amends, and such proceedings shall be had and taken thereupon and in relation to the monies so paid into court as are prescribed by the 70th, 71st, 72d, and 73d sections of the Act 15 & 16 Vic. c. 76." *See post*, Payment into Court.

(D) *The Action must be brought within Two Months; and the Defendant may give Special Matter in Evidence under the General Issue, and is entitled to Costs if successful.*

The action must be brought within two months; and the defendant may give special matter in evidence under the general issue, and is entitled to costs if successful.

By 16 & 17 Vic. c. 107, s. 317, "every such action against any officer of customs or other such person as aforesaid shall be commenced within two months after the cause of action shall have arisen; and if such action be brought in respect of any seizure made by such officer or other person, such cause of action shall not be deemed to have arisen until the day after the trial, if the information with respect to such seizure, and the venue in such action shall be laid in the county or place where the cause thereof is alleged to have occurred; and the defendant may plead the general issue, and give the special matter in evidence on the trial thereof; and if the plaintiff shall be nonsuited or discontinue, or if upon a verdict or demurrer judgment shall be given against him, the defendant shall be entitled to costs, and have such remedy for recovering the same as any defendant now has in other cases where costs are legally recoverable."

(E) *The Plaintiff Suing in a Superior Court has no Costs where the Damages do not exceed 20l., unless the Judge certify or the Court or Judge make an Order.*

The plaintiff suing in a superior court has no costs where the damages do not exceed 20*l.*, unless the judge certify or the court or judge make an order.[1]

By 16 & 17 Vic. c. 107, s. 323, "if in any action commenced after the passing of this act in any of the superior courts of record in England, Ireland or Scotland, in which the plaintiff shall seek to recover damages for any alleged illegal seizure or detention of any ship or goods, the said plaintiff shall recover a sum not exceeding 20*l.*, such plaintiff shall have judgment to recover such sum only and no costs, unless at the trial of such cause the judge shall certify on the back of the record either that the case was one that could not be tried, if in England, in the county court; if in Ireland, in the civil bill court; or if in Scotland, in the sheriff's court; or that, although within the jurisdiction of those courts respectively, it nevertheless was a fit case to be tried in one of such

[1] By the 318th sect. of the 16 & 17 Vic. c. 107, it is enacted, that any party complaining of the illegal seizure of any boat, vessel, or goods, may, after service of the notice in writing, to the effect and within the time hereinbefore provided, shall have been tendered, proceed against the officer by whom such seizure shall have been made, by plaints in the county court in England, or by civil bill in the assistant barrister's court in Ireland, or by summons in the sheriff's courts in Scotland: Provided always that the sums claimed for damages by the party so complaining shall not exceed the amounts to which the jurisdiction of the said courts respectively is limited."

By the 319th sect. "in the event of any party so complaining as aforesaid resorting for redress to the county courts in England, the action shall be brought within the district in which the cause of action shall have arisen, and the proceedings and conduct of the suit shall be regulated, as nearly as the circumstances of the case shall allow, in conformity with the provisions of the acts and orders which govern the practice and procedure of the said courts, and such right of appeal shall be allowed to the parties as is provided by the County Courts' Acts in other actions now triable by such courts: Provided always that in every such suit or plaint the county-court judge shall hear and

superior courts, or (in case there shall be no trial) unless the court or judge shall make an order to that effect; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs."

(F) *A Party complaining of the Illegal Seizure of any Boat, &c., may proceed in the County Court.*

CY Près. Fr. *As near to.* Applied to the construction of a will or deed, by which the court sometimes gives effect to that which is the apparent intention of the party, although the expressed intention cannot, to its full extent, be carried out.[1]

D.

DAMAGE Feasant.[2] *See* Common, *ante*, p. 143; *post*, Distress; Game; Pound; Replevin; Trespass.

STOREY v. ROBINSON, 6 T. R. 138.

A horse cannot be distrained damage feasant if there be a rider upon him.[3]

Trespass for seizing and leading away the plaintiff's horse, on which he was riding. *Plea*, that the defendant distrained him damage feasant in the land of the defendant. *Demurrer*, on the ground that a horse on which the owner is riding cannot be distrained.

Lord Kenyon, C. J. "All the authorities upon this point are collected in Harg. Co. Litt. 47, and the clear result of them is that such a distress is illegal. If it were permitted to a party to distrain a horse while any person is riding him, it would perpetually lead to a breach of the peace."

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determine such case without the assistance of a jury; and that no order for the trial thereof by a jury shall be made by any county-court judge, except upon the written consent of the plaintiff or defendant."

[1] In order to preserve and effect something which the court collects from the will to have been the paramount object of the testator, it rejects something else which is regarded as merely a subordinate purpose; namely, the mode of carrying out that paramount intention. *Vanderplank v. King*, 3 Hare, 11: *per Wigram, V. C.*

If the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects, which happen to fail from whatever cause, although in such cases the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness, illegality, or failure of its immediate objects, be carried into effect. Jar. Wills, 223, 3d edit.; 2 Spence, Eq. Jur. 126.

[2] Damage feasant, or faisant, is when a stranger's beasts are found in another person's ground, without his leave or license, and without his default, doing damage there, by feeding or otherwise; in which case the occupier may distrain and impound them, as well by night as by day, until satisfaction be made. *See* 51 Hen. 3, stat. 6; 1 Inst. 142.

This remedy is available by any person who is aggrieved by such damage. Thus the owner of the soil, though he have no present interest in the pasture or herbage, may distrain cattle damage feasant on the plants and trees in which his interest still continues (*Hoskins v. Robins*, 2 Saund. 328); and the grantor of the vesture of the soil may distrain cattle damage feasant thereon. *Burt v. Moore*, 5 T. R. 329. Nor is this right to distrain confined to beasts; it extends also to inanimate goods upon the land doing damage. Thus, if turves be laid on a common, they may be distrained by a commoner as damage feasant. *Bromhall v. Norton*, Sir T. Jones, 193. *Baker v. Leathers*, Wightw. 113. The party aggrieved adopts this remedy at his option, as wherever he may distrain he may bring trespass, but he cannot do both. Bullen on Distress, p. 234.

[3] And this has been held to extend to the case of a horse being led at the time, and to harness, and other things in "manual use," though they be so in use in doing the damage complained of, in consequence of the tendency to a breach of the peace. *Field v. Adames*, 12 Ad. & E. 649.

SINGLETON v. WILLIAMSON, 31 L. J. Ex. 17.

Nor can cattle be distrained damage feasant if such damage be the natural result of a wrongful act of the distrainor.

Trover to recover cattle, with count in *detinue.*

The plaintiff was the occupier of a close, bounded on the north by the river Trent. Bridge Green, a close of the defendant, was separated by the river from the close of the plaintiff. On the defendant's side of the river there was a fence, which by an Inclosure Act he was bound to repair. The defendant also had another close called the Cornfield, separated by a fence from Bridge Green, which fence was in good repair. The cattle crossed the river, got through a gap in the fence into Bridge Green, and then broke down the fence between that close and the cornfield, where they were distrained by the defendant, as he alleged, damage feasant:—*Held*, that the judge properly directed the jury that it was quite immaterial what was the state of the second fence, or whether the cattle were damage feasant, inasmuch as the original fault having been with the defendant, he had no right to distrain, the damage being the natural consequence of his own neglect.

DAMAGES.

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(B) *When otherwise in Tort*, p. 547.

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(F) *Measure of, in Particular Cases.*

See

Abandonment, vol. i. p. 2
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Brokers, id. p. 535
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Contribution, id. p. 212
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Covenant, id. p. 443
Customs and Excise, id. p. 542
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Demurrer
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Guarantee
Husband and Wife
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Principal and Agent
„ Surety
Quare Impedit

Rent
Repair
Replevin
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X. How Recovered. *See post*, Execution; Judgment.

XI. Remission of Damages, p. 553.

I. What, and when Recoverable.[1]

(A) *In Actions* ex Contractu *Damages cannot be severed.*[2]

(B) *When otherwise in Tort.*[3]

[1] Damages are the sums awarded to a successful plaintiff as pecuniary satisfaction or compensation for the wrong he has sustained, and for which his action is brought, to be paid by the defendant to the plaintiff, as specified in the record of the judgment of a court of justice. Co. Litt. 257; 10 Co. 116. They are recoverable at common law in all personal and mixed actions (3 Bl. Com. 118); but in real actions, only when given by statute. 2 Inst. 286. They are also not recoverable in an indictment or information (1 Roll. Abr. 220; 2 H. P. C. c. 25, s. 3); nor in an action on a penal statute by a common informer, though it is otherwise where the action is brought by the party grieved. *Frederick v. Lookup*, 4 Burr. 2018. *Caming v. Sibley*, id. 2489.

[2] In actions *ex contractu* damages must be given against all the defendants or none, nor does the power given by the C. L. P. Act, 1852, s. 37, of amending a misjoinder of a defendant at the trial, at all affect this rule, as the damages will lie against all the defendants remaining on the record after the amendment. *Robson v. Doyle*, 3 E. & B. 96.

[3] In actions *ex delicto* also the rule would appear to be, that wherever the defendants are found guilty of a joint wrong the jury must assess damages generally against all, and this even though they sever in pleading. 11 Co. 6 a, 7 a. *Eliot v. Allen*, 1 C. B. 18. *Clark v. Newsam*, 16 L. J. Ex. 297. Torts, however, being in their nature several, the jury may find one guilty and acquit the

III. *Against whom Damages may be Recovered.*

Gregory v. Cotterell and others, 22 L. J. Q. B. 217.

Qu. Whether in an action of trespass against several defendants, who have taken different parts in the transaction, damages can be severed?

Trespass for breaking and entering the plaintiff's house and seizing his goods. The defendants were the sheriffs of Middlesex, and Slowman a bailiff of the sheriffs. Slowman, severing from the other defendants, pleaded not guilty, and a justification under a *fi. fa.* upon a judgment recovered against the plaintiff, and a warrant from the sheriff to him and another bailiff. *Replication*, alleging a prior warrant from the sheriff to E. J., another bailiff, a seizure of the plaintiff's goods under that warrant, and thereupon payment to and acceptance by the sheriff of the full amount in satisfaction of the writ. *Rejoinder*, that E. J. did not seize the goods, nor did the sheriff accept *modo et formâ*. On the trial it appeared that under the warrant to E. J. a seizure was made by E. J.'s son, by the authority of E. J. Afterwards, and before any sale, the plaintiff's solicitor went to the office of E. J., and being unable to see E. J., who was ill, he there paid the full amount in satisfaction of the execution to the son, who thereupon, in E. J.'s name, withdrew the man whom he had left in possession, and gave notice to the execution-creditor that the money was ready for him at his father's office. There was contradictory evidence as to the payment over of the amount to E. J., who died on the same day, and the money was not paid to the execution-creditor. The other defendants, as sheriffs, afterwards issued a fresh warrant to Slowman and Gover, another bailiff, treating the first warrant as a nullity; and the plaintiff's goods were again seized under it, and a man left in possession for several days by Gover, Slowman taking no part in the seizure. The jury did not argue as to whether the money had been paid over to E. J., but they were of opinion that the son executed the warrant by the direction of E. J.; that he had authority from E. J. to act for him in his office, and that the money had been received under that authority. The learned judge directed the jury that, being of that opinion, they might find a payment of the money to the sheriff; and thereupon a verdict was found for the plaintiff, damages 400*l.*

The court was afterwards moved on behalf of Slowman, on the ground (amongst others) that the damages were excessive; and the other defendants had also moved on the same ground.

Per Cur. The jury appears to have thought that this was a case in which the process of the court had been abused, and a gross outrage was committed under the forms of law. We cannot say that they were wrong in coming to this conclusion; and if they were right we should not be justified in interfering, on behalf of the sheriff, with the amount of compensation which they have awarded in the execution of their constitutional functions. But possibly a different question may present itself when the application is made on behalf of Slowman the officer, who does not appear to be implicated in the aggravations

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rest, but if they find several guilty they can only convict them of a joint offence. *Aaron v. Alexander*, 3 Camp. 35. *Powell v. Hodgetts*, 2 Car. & P. 432. *Haward v. Newton*, 2 M. & Rob. 509. *Hill v. Goodchild*, 5 Burr. 2790. But the jury may, it is said, find one guilty of the trespass at one time, and one at another (11 Co. 5 b), or one of them guilty of one part and another of another part (Cro. Car. 54), or some guilty of the whole trespass and others of part only (Cro. Eliz. 860); in all which cases they may sever the damages. In cases in which the defendants sever in pleading, it would seem that where the plea of one of the defendants is such as shows the plaintiff could have no cause of action against any of them, there, if the plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have damages against those who allow judgment to go by default (*see* 2 Ld. Raym. 1372; 1 Stra. 610; 8 Mod. 217): but where the plea merely operates in discharge of the party pleading it, there it shall not enure to the benefit of all the other defendants; but the plaintiff, notwithstanding such plea being found against him, may have damages against the other defendants. *See* 2 Stra. 1108.

If there be a demurrer to part and an issue upon other part, or, in an action against several defendants, if some of them demur and others plead to issue, the jury who try the issue shall give damages for the whole against all the defendants. *See* 2 Tidd. 902.

which might justify the amount of damages as against the sheriff. It has been said that in an action of tort against several defendants, who have taken different parts in the transaction, the measure of damages ought to be the sum which ought to be awarded against the most guilty of the defendants. But as our suggestion that a *nolle prosequi* should be entered as to Slowman has not been accepted, we wish to afford an opportunity for discussing whether there be such a doctrine, and how far it applies to the present cause. We therefore grant to Slowman a rule to show cause why there should not be a new trial, on the ground that the damages are excessive, and on that ground only.

IV. As to the Measure of Damages.

(A) *General Observations on.*[1]

(B) *Rule in Actions for Non-payment of Money.*[2]

(C) „ *other Actions on Contracts.*[3]

(D) „ *Breach of Promise of Marriage.*[4]

(E) „ *Actions for Tort.*[5]

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[1] The measure of damages in particular actions will be best considered, and more readily referred to, by being placed under the several heads to which they respectively relate; and the reader, in search of the measure of damages in any particular cause of action, is accordingly referred for further details to the head which treats of the subject-matter under his consideration. It may, however, be advantageous in this note to give shortly the result of the general principles which have lately been so much discussed in the courts at Westminster, and which are so ably treated in the text-books of Mr. Sedgwick and Mr. Mayne.

The old theory, that damages are a compensation or satisfaction for some injury sustained (2 Bl. Com. 458), is clearly very seldom, if ever, strictly true. In an action for breach of contract, accordingly, the law takes no notice of the indirect pecuniary loss sustained, the vexation or anxiety caused, or the value of time consumed, in consequence of such breach. And this is the case in all actions where there is no wilful wrong, or malice, or fraud. The observation of Domat, *Loix Civiles*, Lec. III., tit. 5, s. 11, that the object to be attained in fixing a measure of damages is not so much to give perfect satisfaction or compensation to the party injured, as to discriminate on sound principles between that portion of the loss which must fall on the offending party, and that which must be borne by the sufferer. And this deficiency of compensation applies also to a defendant wrongfully charged, as the costs he may recover in no way reimburse him for his annoyance, loss of time, &c.

[2] In actions for the non-payment of money the damages will be limited to the principal and interest, no matter what the amount of the inconvenience sustained by the plaintiff in consequence. *Fletcher v. Tayleur*, 17 C. B. 29.

[3] In other actions on contracts the rule will be as laid down in *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179, "that where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *See* also *Portman v. Middleton*, 27 L. J. C. P. 231. And in an action on a contract no notice whatever will be taken of the motives or conduct of the party breaking it (Mayne on Damages, p. 10); nor can any damages in general be recovered that are incapable of being specifically stated and appreciated with certainty, but which depend much on the feelings or inclination of the jury. *Hamlin v. Great Northern Railway Co.* 1 H. & N. 408; 2 Jur. N. S. 1122; 26 L. J. Ex. 20.

In *Fletcher v. Tayleur*, 17 C. B. 22, 25 L. J. C. P. 65, it was thrown out by *Jervis, C. J.*, and approved by *Willes, J.*, that a general rule should be established in all cases of breach of contract, viz. that an average per-centage of mercantile profits should be the fair measure of damages for a breach of a mercantile contract; and that in an action for the non-delivery of a chattel, the measure of damages should be fixed to be the average profit made by the use of such a chattel, by analogy, to the measure of damages for the breach of a contract to pay money. But this rule, however reasonable, does not seem to have been acted on.

[4] The damages recovered in an action for breach of promise of marriage seem to be an exception to the general rule, and for those the reader is referred to that particular head.

[5] In actions for tort, where no evil motive is charged, the amount of compensation is also to be regulated by the direction of the court, and the jury cannot substitute their own vague and arbitrary discretion for the

V. Mode of Assessing Damages.

(A) *In General.*

Damages in general are assessed by the jury on the trial of an issue, or on a writ of inquiry, or by reference to the master.

Damages are in general assessed either by the jury, independently of the court, or under its authority, on trial of an issue joined between the parties; but where a defendant suffers judgment to go by default, or where judgment has otherwise passed, as on demurrer, and where some damage is admitted or decided to have been sustained by the plaintiff, the assessment of the damages is referred to a jury by writ of inquiry, or they may be assessed by reference to the master.

By the Common Law Procedure Act, 1852, s. 94, "in actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry; but the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the masters of the court." And by s. 95, "in all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages."

There is no distinction between the debt and damages.

(B) *When no Assessment requisite.*

(*a*) *When Writ specially Indorsed.*

Where writ is specially indorsed, and defendant does not appear, plaintiff may issue execution without assessment of damages.

By C. L. P. Act, s. 27, "in case of non-appearance by the defendant, where the writ of summons is indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under the provisions of this act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule (A) to this act annexed, marked No. 5 (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, to the date of the judgment, and a sum for costs (to be fixed by the masters of the said superior courts, or any three of them, subject to the approval of the judges thereof, or any eight of them, of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way; and the plaintiff may upon such judgment issue execution at the expiration of eight days from the last day for appearance, and not before: Provided always, that it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application, supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits."

(*b*) *When Writ not specially Indorsed.*

Where, if writ not specially indorsed, plaintiff may issue execution without assessment.

By C. L. P. Act, s. 28, "in case of such non-appearance, where the writ of summons is not indorsed in the special form hereinbefore provided, it shall and may be lawful for the plaintiff, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed under

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rules which the law lays down (Sedgwick, on Damages, p. 201). In such circumstances, or where they have taken place under a fancied right, injuries to property are only visited with damages proportioned to the actual pecuniary loss sustained; but if they have been attended with malicious motive, insult, or other circumstances of aggravation, such additional ingredients may be considered in awarding the amount of damages. And where the injury is to the person, character, or feelings, attended with malice, fraud, violence, or the like, exemplary, and even vindictive damages may be given. Mayne on Damages, p. 13. *Thomas v. Harris*, 27 L. J. Ex. 353.

the provisions of this act and a copy of the writ of summons, to file a declaration indorsed with a notice to plead in eight days, and to sign judgment by default at the expiration of the time to plead so indorsed as aforesaid; and in the event of no plea being delivered, where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the writ of summons hereinbefore provided, and the amount claimed is indorsed on the writ of summons, the judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the writ of summons, with interest at the rate specified, if any, and the sum fixed by the masters for costs, as hereinbefore mentioned, unless the plaintiff claim more, in which case the costs shall be taxed in the ordinary way: Provided always, that in such case the plaintiff shall not be entitled to more costs than if he had made such special indorsement, and signed judgment upon non-appearance."

(C) *Assessing Damages severally against same Defendant.*[1]

(D) „ „ *against several Defendants.*[2]

(E) *Where Jury have omitted to Assess.*[3]

VI. Mitigation of Damages.

Watson v. Christie, 2 B. & P. 224.

Matters which ought to be pleaded specially cannot be admitted in evidence in mitigation of damages.[4]

To trespass for an assault and battery, the defendant pleaded the general issue. It appeared in evidence for the plaintiff, that he was a seaman on board the defendant's vessel, and had been beaten while under his command so severely as to have materially injured his health. The defendant proposed to prove that the beating was received as a punishment for breach of discipline on board the ship; and it was contended that the evidence adduced of the defendant's conduct sufficiently proved the plaintiff's misbehaviour.

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[1] Wherever two or more causes of action are alleged in the same declaration against the defendant, and a general verdict be found for the plaintiff, damages may be assessed severally (*see* 1 Roll. Abr. 570, pl. 1); and if entire damages be assessed, and the action does not lie as to one of the causes alleged, the court will not arrest the judgment, but will award a *venire de novo*. *Leach v. Thomas*, 2 Mee. & W. 427. *Chadwick v. Trower*, 6 Bing. N. C. 1. But where a general verdict has been taken and evidence given only on the good counts, the court has permitted the verdict to be amended by the judge's notes (1 Dougl. 376; 1 B. & P. 329; 1 H. B. L. 78; 1 B. & A. 161; 3 T. R. 448; 5 Taunt. 2); or if the jury have calculated the damages on evidence applicable to the good counts only, the court will amend the verdict by entering it on those counts, though evidence were given applicable to the bad counts also (1 B. & P. 329); but this cannot be done after any great lapse of time. 1 B. & A. 161.

In slander, if the words in one count be, some actionable and some not, entire damages may be given. *Kitchenmore v. Skeel*, 3 Ex. 49; Moore, 142, 143, 708. But where there are several counts, and the words in some of them are not actionable, entire damages cannot be awarded. *Emblin v. Dartnell*, 12 Mee. & W. 830. *Empson v. Griffin*, 11 Ad. & E. 186.

Where there are two counts on the same agreement with different breaches, damages can only be given on one count. *Holford v. Dunnett*, 7 Mee. & W. 348. *Deere v. Joy*, 4 Q. B. 379. *Hartley v. Harman*, 3 Per. & D. 567.

[2] In an action against several persons who are found guilty of separate takings or offences, damages ought to be assessed against them severally. *See* 1 Roll. 570. But where there is a joint cause of action against divers persons, damages ought not to be assessed severally, and if they are, a *venire de novo* will be awarded. *See* 11 Co. 5 b; Carth. 20. And the same rule holds although one defendant may have been more culpable than the others. *See* 4 Esp. 156; and *see ante*, p. 548, as to severing damages.

[3] Where the jury have omitted to assess the damages on the trial of an issue, a writ of inquiry may be awarded for that purpose. 10 Co. 118. *Eichorn v. Le Maitre*, 2 Wils. 367. *Phillips v. Jones*, 15 Q. B. 859. But this is not so in an issue on a plea in abatement. *Eichorn v. Le Maitre*, *supra*. *Foxwist v. Tremaine*, 2 Saund. 211, n. 3. Nor in replevin on a verdict for defendant under the 17 Car. 2, c. 7. *Herbert v. Waters*, 1 Salk. 205; 1 Ld. Raym. 59. *Freeman v. Archer*, 2 W. Black. 763.

[4] *See* 2 Stra. 1200; Keilw. 203, b; 2 Lev.

Lord Eldon, C. J., in his direction to the jury, restricted them to the finding of the fact of whether an assault had been committed, and the amount of damage sustained, observing that, if the beating could have been justified, that matter should have been specially pleaded. The jury gave their verdict accordingly; and on motion for a rule *nisi* to set it aside, on the ground that the judge had misdirected the jury, by excluding from their consideration the evidence offered on the part of the defendant, the court said that his lordship had directed the jury properly.

VII. Increasing and Abridging Damages.

(A) *New Trial on Account of Excess.*[1]
(B) „ „ *of Smallness.*[2]
(C) *New Writ of Inquiry.*[3]

VIII. Nominal Damages.

Feize v. Thompson, 1 Taunt. 121.

If a jury be about to give a verdict for the defendant from inability to estimate the plaintiff's damages, the court will allow the latter to enter a verdict for a nominal sum.[4]

The plaintiff in this case declared for general average on a policy of insurance on goods shipped on his account, and being unable to show clearly the extent of the loss on the adventure, the jury were about to find for the defendant, as they could not estimate the plaintiff's damages, when the plaintiff consented to a nonsuit; and on a rule *nisi* to enter a verdict for the plaintiff, the court, on an intimation from *Heath, J.*, that such course was not without precedent, said, they had the power of assessing damages where the jury were unable, and made the rule absolute with nominal damages.

IX. Double and Treble Damages.

Anon. 1 Ld. Raym. 342.

Double and treble damages are given by statute.[5]

On an action for rescuing goods distrained for an arrear of rent, in order to sell them *secundum leges et statuta Angliæ*, there was a verdict for the plaintiff with single damages. Upon a motion that the treble damages, which are given by 2 Wm. & M. stat. 1, c. 5, might be awarded, the court held, that the plaintiff was not entitled to treble damages, because he had neither alleged that the

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81; 1 Sid. 236; 1 Ld. Raym. 727; Vin. Abr. Evidence (l. b.), pl. 16; 12 Mod. 232; Esp. N. P. 337. *Speck v. Phillips*, 8 Mee. & W. 279. *Finch v. Blount*, 7 C. & P. 478. *Day v. Porter*, 2 M. & R. 151. What circumstances may be given in evidence in particular cases will be found under those heads.

[1] Prior to 1695, the courts would not interfere on account of excess of damages. *See* 2 Mod. 150; Comb. 357. Since that period they have exercised a discretionary power. *See* 1 T. R. 277, and granted new trials on account of excess of damages. *See* 7 id. 529; and *post*, New Trial, where the cases will be arranged and abridged; and the court will not now in any case reduce the damages without the consent of the plaintiff: if he refuse, they can do nothing but order a new trial. *Leeson v. Smith*, 4 Nev. & M. 304. *Moore v. Tuckwell*, 1 C. B. 607. Damages can only be increased by the courts at Westminster, 1 Vent. 353. *Cook v. Beal*, 1 Ld. Raym. 176.

[2] It is not usual with the court to grant a new trial on the ground that the damages are smaller than the court may think reasonable. At any rate, a new trial ought not to be granted on such a ground, unless the judge who tried the cause is dissatisfied with the smallness. *Gibbs v. Tunaley*, 1 C. B. 640; 2 Stra. 940; 2 Barnes, 354. *See post*, New Trial.

[3] The court will award a new writ of inquiry where they would award a new trial. Chit. Prac. 1438. *See post*, Inquiry, Writ of.

[4] Nominal damages mean a sum of money which may be spoken of, but has no existence in point of quantity. 2 C. B. 499. Every injury imports a damage, though it does not cost the party one farthing. *Ashby v. White*, 1 Salk. 19. Wherever any act injures another's right, and would be evidence in future in favour of the wrongdoer, an action is maintainable without proof of specific damage. *Mellor v. Spateman*, 1 Saund. 346, a. And in such an action, such a verdict and damages is as effectual as any sum, however large, for it establishes the fact of the plaintiff's title. Sedgwick on Damages, p. 54.

[5] They are not recoverable at common

rescue was *contra formam statuti*, nor brought his case within the statute by showing that the goods were appraised.

BENNET v. HART. Cited Sayer on Damages, 244.

In an action on the 43 of Eliz. c. 2, against overseers, there was a verdict for the defendant, but the jury omitted to assess the treble damages given by that statute; a writ of inquiry was awarded. And the court said, if judgment had been entered up, the application for a writ of inquiry would have been too late.

And may be assessed at any time before judgment, if the jury omit to assess them in their verdict.[1]

XI. REMISSION OF DAMAGES.[2]

DANCING.

(A) *Places kept for Public Dancing must be Licensed.*

By 25 Geo. 2, c. 36, it is enacted, "that any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a license had for that purpose, from the last preceding Michaelmas quarter sessions of the peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorised and empowered to grant such licenses as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place; and every such license shall be signed and sealed by the said justices in open court, and afterwards be publicly read by the clerk of the peace, together with the names of the justices subscribing the same, and no such license shall be granted at any adjourned sessions, nor shall any fee or reward be taken for such license; and it shall and may be lawful to and for any constable or other person being thereunto authorised by warrant under the hand and seal of one or more of his Majesty's justices of the peace of the county, city, riding, division, or liberty where such house or place shall be situate, to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with according to law; and every person keeping such house, room, garden, or

Unlicensed places for dancing, &c. deemed disorderly houses.[3]

Constables may seize persons.

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law. *See* Sayer on Damages, 242; Mayne on Damages, 333. Where a statute gives double or treble damages the plaintiff is entitled to double or treble the sum *actually found* by the jury, and not to be calculated in the same manner as treble costs. *See* Lee, Dict. 420; 4 B. & C. 154; 8 Hen. 6, c. 9, s. 6; 13 Hen. 6, c. 10, s. 11; 29 Eliz. c. 4; 1 & 2 P. & M. c. 12, s. 1; 43 Eliz. c. 2, s. 19; 2 Wm. & M. sess. 1, c. 5, ss. 4 and 5. *See* also Ld. Raym. 342; Salk. 205. *Masters v. Ferris*, 1 C. B. 715. *Newman v. Barnard*, 10 Bing. 274; Cro. Car. 438.

[1] In all cases it is the practice to take the sum awarded by the jury, and, without any further communication with them, to double or treble the amount. *Attorney-General v. Hatton*, 13 Price, 476.

[2] Where the jury give greater damages than are claimed in the declaration the plaintiff may remit the excess by entering what is called a *remittitur damna*. *Wray v. Lister*, 2 Stra. 1110; Yelv. 45. So, when on a writ of trial before the sheriff they give more than 20*l*. (*Fryer v. Smith*, 12 L. J. C. P. 223); or if they give damages in a penal action. *Hardy v. Cathcart*, 1 Marsh. 180. So where there are several counts on which judgment has gone by default, on some of which a writ of inquiry is necessary, and not on others, the plaintiff may have final judgment on the latter counts by entering a *remittitur damna* on the former. But he cannot bring a second action on those counts (*Bowden v. Horne*, 7 Bing. 716); and he cannot do so where there has been a payment on all the counts. *Jones v. Shiel*, 6 Dowl. 579. The plaintiff, however, can only make this amendment himself before signing judgment, though the court may authorise it afterwards, after writ of error and in a subsequent term. *Pickwood v. Wright*, 1 H. Black. 643. *Wray v. Lister*, 2 Stra. 1110. *Mills v. Funnell*, 4 D. & R. 561. But see *Phillips v. Jones*, 15 Q. B. 859. If in an action against several the damages are severed improperly, the plaintiff may remit the lesser and have judgment for the greater. *Rodney v. Strode*, Carth. 19. *Mitchell v. Millbank*, 6 T. R. 199. A remittitur in ejectment is no answer to an action for mesne profits. *Harper v. Eylas*, 3 Dougl. 399.

[3] A house kept for the purposes of dancing,

other place without such license as aforesaid, shall forfeit the sum of one hundred pounds to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses."

By sect 2, licensed places are to have an inscription of being licensed over them, and not to be opened before five in the evening.

By sect. 3, the theatres of Drury Lane, Covent Garden, and the Haymarket, and all places carried on under letters patent or license from the Crown or of the Lord Chamberlain.

By ss. 5, 6, 8, 9, the proceedings in prosecutions are regulated. *See post*, Disorderly House.

DARREIN Presentment. An assize of *darrein presentment*, or last presentation, used to be when a man, or his ancestors under whom he claims, have presented a clerk to a benefice, who is instituted; and afterwards upon the next avoidance a stranger presents a clerk, and thereby disturbs the real patron. In which case the patron had this writ directed to the sheriff to summon an assize or jury to inquire who was the last patron that presented to the church now vacant, of which the plaintiff complained that he was disseised by the defendant; and according as the assize determined that question, a writ issued to the bishop to institute the clerk of that patron in whose favour the determination was made, and also to give damages in pursuance of the Statute of Westminster, 2; 13 Edw. 1, c. 5. But, after the statute of 7 Anne gave a right to any person to bring a *quare impedit*, and to recover (if his title be good), notwithstanding the last presentation by whomsoever made, assizes of *darrein presentment* were disused. *See* 2 Inst. 355; 3 Black. Com. 245. And now, by s. 26, 23 & 24 Vic. c. 126, no *quare impedit* shall be brought after the commencement of this act in any court whatever; but where such writ would lie, an action may be commenced by writ of summons in the Common Pleas.

DATE. *See* Bills and Notes, vol. ii. p. 400; Bond, id. 504; Contracts, *ante*, p. 193; Declaration, *post*, p. 570; Deed; Pleading; Time.

DAUGHTER. *See* Abduction, vol. i. p. 45; *post*, Master and Servant; Parent and Child; Seduction; Witness.

DAY. *See post*, Time.

DAY Rule.[1] Abolished by 5 & 6 Vic. c. 22, s. 12.

DEACON. *See post*, Ecclesiastical Persons.

DEAD Bodies. *See* Anatomy, vol. i. p. 347; Burial, vol. ii. p. 16; Coroner, *ante*, p. 255.

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to which persons are admitted for money, is within this statute, though public dancers are not kept for the purpose of exhibiting as performers. *Clarke v. Searle*, 1 Esp. 25. And it is not necessary that the keeper thereof should take money at the door. *Archer v. Willingrice*, 4 Esp. 186. But a room kept by a dancing-master for the instruction of his scholars and subscribers, and to which persons are not indiscriminately admitted, is not within the statute. *Bellis v. Burghall*, 2 Esp. 722. Nor will the mere temporary use of a room in a public-house for the purpose of dancing on a particular festival or occasion subject the owner to the penalty. *Shutt v. Lewis*, 5 Esp. 128. But a room in which musical performances are regularly exhibited, though not kept, and used solely for that purpose, is within the statute, and requires a license. *Bellis v. Beal*, 2 Esp. 592. *Green v. Botheroyd*, 3 Car. & P. 471. The house or room must be kept with the defendant's knowledge; it must be kept for the purpose prohibited by the statute; there must be something like an habitual keeping it, which, however, need not be at stated intervals; and it must be public, to which all persons have a right to go, whether gratuitously or on payment of money, no matter whether paid to the defendant or not, if he knows of the payment. *Marks v. Benjamin*, 5 Mee. & W. 565.

[1] This was a permission granted to a prisoner for debt to go out of prison, or beyond the rules.

DEAD Freight. *See post*, Freight.

DEAF and Dumb.

Rex v. Jones, 1 Leach, C. L. 102. S. P. Rex v. Steel, 1 id. 451.

A deaf and dumb person may be tried, if a communication can be conveyed by signs or symbols.[1]

The jury found that the prisoner was deaf and dumb by the visitation of God, but it appearing that he had been in the habit of communicating his ideas with a particular person, and upon that individual swearing that he could make the prisoner understand by means of signs, he was convicted and transported.

DEAN and Chapter. *See post*, Ecclesiastical Persons.

DEATH. *See* Abatement, vol. i. p. 6 ; Arbitration, id. p. 427 ; Bankrupt, vol. ii. p. 141; County Court, *ante*, p. 330 ; Executor and Administrator ; Partners ; Pedigree ; Power of Attorney; Principal and Agent ; Probate ; Public Officer ; Sheriff ; Trustee.

(A) *On whom is the Onus of Proving*, p. 555.

(B) *Presumption of, after Seven Years*, p. 555.

(C) *Under other Circumstances*, p. 555.

(D) *No Presumption as to Survivorship where Several are Destroyed in a Calamity*, p. 556.

(A) *On whom is the Onus of Proving.*

Wilson v. Hodges, 2 East, 312.

It is for the party who asserts the death of another to prove it.[2]

In this case the question was whether the issue lay on the defendants to prove the death of one A. B., or on the plaintiffs to prove that he was alive. The judge was of opinion that it lay on the defendants, who averred the death of the party. And of that opinion were the court, who said that where the issue is upon the life or death of a person, once shown to be living, the proof of the fact lies on the party who asserts the death.

(B) *Presumption of, after Seven Years.*[3]

(C) *Under other Circumstances.*[4]

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[1] And such a person is a competent witness. *Rex v. Ruston*, 1 Leach, 408. So a person born deaf and dumb, who signified by signs that she understood what she was about to do, was allowed to levy a fine. Carth. 53.

It is said that a person born blind, deaf, and dumb is to be looked upon as an idiot, and not accountable. 1 Com. 304, F. N. B. lib. i. c. 7. *See* Lunatic.

[2] And the fact of any party being alive or dead at any particular period must be proved by the party asserting it. *Doe d. Nepean*, 2 Mee. & W. 894 ; 5 B. & Ad. 86.

[3] The law presumes that a person shown to be alive at a given time remains alive until the contrary is shown. But at the end of seven years, if he have not been heard of during that period, another presumption of law arises, namely, that he is dead: but there is no legal presumption as to the time of his death. *Nepean v. Knight*, 2 Mee. & W. 894. *Doe v. Jesson*, 6 East, 84. *Doe v. Deakin*, 4 B. & A. 433. *Hopewell v. De Pinna*, 2 Camp. 113. *Lambe v. Orton*, 29 L. J. Ch. 286. But a person ought not to be presumed dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive. *Watson v. England*, 14 Sim. 28 ; 8 Jur. 1062.

[4] Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead ; but the time of the death, if it become material, must depend upon the particular circumstances of the case. *Watson v. King*, 1 Starkie's C. 121. *Paterson v. Black*, Park's Ins. 433 ; 1 Bl. R. 404. *Doe v. Griffin*, 15 East, 283. *Doe v.*

(D) *No Presumption as to Survivorship when Several are Destroyed by a Calamity.*

WING v. ANGRAVE AND OTHERS, 30 L. J. Ch. 65; 24 id. 293.

In that case Mr. and Mrs. Underwood had embarked on board a ship called the Dalhousie, bound for Sydney, in Australia, and on the 19th of October the ship was totally lost, and they were all drowned. One man alone escaped the wreck, a seaman, Joseph Reed, who has been examined in the cause, and has given a very clear and distinct account of the circumstances of their death. His evidence is, that on the morning of the 19th of October the ship foundered, and, after some little time, went on her starboard beam-ends, and the sea, which was very rough, made a clear breach over; that while the ship was in this state, Mr. and Mrs. Underwood, and the two boys, were drawn out of one of the ports of the

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Wolley, 8 B. & C. 22. And in establishing a title upon a pedigree, where it may be necessary to lay a branch of a family out of the case, it is sufficient *primâ facie* to show that the person has not been heard of for many years. *Rowe v. Hasland*, 1 Black. 405. So proof by one of the family that a particular person had many years before gone abroad, and was supposed to have died there, and that the witness had not heard in the family of his having married, was held presumptive proof of his death without lawful issue. *Doe d. Banning v. Griffin*, 15 East, 293. And the fact of a tenant for life not having been seen or heard of for 14 years by a person residing near the estate, although not a member of his family, is *primâ facie* evidence of the death of the tenant for life. *Lloyd v. Hunt*, 4 B. & Ad. 433. So, where A. went abroad in September, 1830. His father died in September, 1833. About twenty months previously to that time A. was heard of for the last time. A court of equity ordered a share of the father's residue, bequeathed to A., to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it in case A. should be living, or should have died after his father. *Dowley v. Winfield*, 14 Sim. 277; 8 Jur. 972.

So where a settler in New Zealand embarked 1st July, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney, and no intelligence, after inquiries had been instituted, having been obtained as to the vessel, or any of those on board, she was supposed to have foundered at sea in some heavy gale, which occurred at the time she was making the voyage in question:—*Held*, that his death was to be presumed, and that advertisements in newspapers for persons supposed to be dead may be dispensed with when their history is known and traced within a short period of their being last heard of. *Norris, in the Goods of*. 1 S. & T. 6; 27 L. J. Prob. 4. And where A. sailed from Liverpool in the Brevet, the 27th January, 1857, for Valparaiso. The voyage should have been made in ten weeks. Nothing had been heard of either the Brevet or crew since she left Liverpool. The Brevet was insured, and the underwriters had paid policy thereon, as upon a total loss:—*Held*, that the death of A. was to be presumed; the payment of policy by underwriters was strong evidence in favour of such presumption. *Main, in the Goods of*. 1 S. & T. 11; 27 L. J. Prob. 5. Also where the husband of A. had seven years before her death left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country:—*Held*, that he must be presumed to be dead, and probate was granted of her will as if she had died a widow. *How, in the Goods of*. 1 S. & T. 53; 4 Jur. N. S. 366.

But where in an ejectment in 1849, by reversion for premises demised in 1801, for three lives and twenty-one years. Two of the *cestuis que vie* had died before 1828. No witness was called who had ever known the third, and, except the mention of him in the lease (which described him as aged ten years), there was no proof that he had ever existed. No evidence of search for him was given:—*Held*, that to raise the presumption of his death there should have been evidence that he had not been heard of by those persons who would naturally have heard of him had he been alive, or that search had been ineffectually made to find such a person, and that the mere fact that no witness called had heard of him was not sufficient. *Doe d. France v. Andrews*, 15 Q. B. 756.

As to the circumstances under which a person, who had not been heard of since June, 1845, was presumed to have survived another who died in 1850, see *Ommaney v. Stilwell*, 2 Jur. N. S. 1058, R.

A sailor who left England in May, 1845, on the Arctic expedition, with Sir John Franklin, and who had not been heard of since June, 1845, was presumed in 1856, under particular circumstances, to have survived until January, 1850. *Ommaney v. Stilwell*, 23 Beav. 328; 2 Jur. N. S. 1058.

The recital of the death of a prior tenant for life in a private act of parliament:—*Held*, upon an application by a subsequent tenant for life for payment of the income, to be insufficient evidence of the death. *Cowell v. Chambers*, 21 Beav. 619. Nor are letters of administration any evidence of the death of a party. *Thompson v. Donaldson*, 3 Esp. C. 63.

ship; that when he left them, which was a very few minutes after they were brought out, they were all standing together on the side of the ship, the husband with the wife in his arms, and the two boys clinging to their mother; they were all clasped together; that while in this position the sea swept them off, and his belief is that they all four went down instantly in a whirlpool or eddy, caused by the heave of the ship's counter, and never rose again.

It was contended in this cause that the correct conclusion from this evidence was that Mr. Underwood survived his wife.

Sed per Cur. In the French code the rule of survivorship is made a matter of positive regulation and enactment, varying according to the age and sex of the persons dying in the same shipwreck; but in our law it is not so. The survivorship is the subject of evidence to be produced before the tribunal, who is to determine it as it determines any other fact. Here there may be surmise, speculation, and guess, but there is no evidence. But the law of England requires evidence, and we are of opinion that there is no evidence upon which we can give a judicial opinion that either survived the other.

DEATH-BED. *See* Dying Declaration.

DEBAUCHING Daughter or Servant. *See* Seduction.

DEBET and Detinet. *See* vol. i. p. 138, n.

DE Bonis non. *See* Executors.

DEBT, Action of.[1]

[1] An action of debt is founded on a contract either express or implied (*see* 4 Co. 93); and is confined in legal consideration to the recovery of a debt *eo nomine* and *in numero*, and not for a compensation in damages. *See* Bac. Abr. Debt (A); Bull. N. P. 167. This remedy is of a more extensive and general nature than either an action of covenant or assumpsit. Com. Dig. Debt; Bac. Abr. Debt; 1 Chit. Pl. 7th ed. 121, &c.; Selw. N. P. Debt. Debt lies where the claim is for a sum certain, or a sum in the nature of a pecuniary demand, and not sounding in damages, and reducible to a certainty, either upon a simple contract or a contract under seal, or upon a record or statute giving a penalty, &c. It lies in all those cases in which the common *indebitatus* count in assumpsit is maintainable, whether the sum be claimed on a contract express or implied, be fixed by agreement, or be demanded upon a *quantum meruit*.

But debt cannot be maintained on a collateral contract (*Randal v. Rigby*, 4 Mee. & W. 130) as a guarantee of the debt of a third person, or by a distant against an earlier party to a bill, &c.; or where only part of an entire claim, payable by instalments, is demanded, and some of the instalments have not accrued due (*see* 1 Chit. Pl. 7th ed. 127), though it lies on a covenant by the defendant to pay absolutely the debt of a third person, the payment not being made to depend upon the default of such third person. *Evans v. Jones*, 5 Mee. & W. 295. *Harrison v. Matthews*, 10 id. 768; S. C. 2 Dowl. N. S. 318. And it lies at the suit of A. on a bond made payable to A. or his attorney (*White v. Hancock*, C. P. April 22, 1846); and an *indebitatus* count for money lent will lie where there is a mortgage deed containing no covenant to pay the money. *Yates v. Aston*, 4 Q. B. 182.

Debt is the proper form of action to be brought on records, as upon the judgment of a superior or inferior court, or on recognisances. *See* Gilb. Debt; 2 Salk. 209; Com. Dig. Debt, A. 2.

An action of debt lies on a penal statute (*see* Com. Dig. Action on the Statute, E.); and if a statute prohibit the doing an act under a penalty or a forfeiture, to be paid to the party grieved, and do not prescribe any mode of proceeding, it may be recovered in this form of action. *See* Roll. Abr. 598; Com. Dig. Action, Debt, E. 1, 2. So, where a penal statute expressly gives the whole or part of a penalty to a common informer, and enables him generally to sue for the same debt as sustainable (*see* id.); but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the recovery of the penalty. *See* Stra. 828; 5 East, 313; *post* Penal Statutes; Qui tam Actions.

Since, however, the C. L. P. Act, 1852, abolished the necessity of mentioning the form of action in the writ, much of the above law is now rendered obsolete and unimportant. Formerly, too, there was an advantage in bringing this action on assumpsit or covenant when they were concurrent remedies, inasmuch as the judgment in debt was final, while in the others it was only interlocutory; but this advantage is now taken away by the C. L. P. Act, s. 93, which enacts that "in actions where the plaintiff seeks to recover a debt or liquidated demand in money judgment by default shall be final." The plea in denial is "never indebted."

DEBTOR and Creditor.[1]

(A) *Of the Parties between whom the relative Situation of Debtor and Creditor may be created.*

Agents. *See* Principal and Agent.
Assignees. *See* Bankrupt ; Bond ; Covenant : Deed ; Insolvent Debtor ; Lease ; Remainder ; Reversion.
Auctioneers. *See* Auction and Auctioneer.
Bankrupt. *See* Bankrupt.
Bastard. *See* Bastard.
Brokers. *See* Principal and Agent.
Churchwardens. *See* Churchwardens.
Commissioners. *See* Bankrupt ; Inclosure ; Lunatic.
Drunkards. *See* Intoxication.
Duress, Persons under. *See* Duress.
Executors and Administrators. *See* Executor and Administrator.
Feme Covert. *See* Husband and Wife.
Gambler. *See* Gaming.
Husband and Wife. *See* Husband and Wife.
Idiots. *See* Idiot.
Lunatics. *See* Lunatic.
Outlaw. *See* Outlawry.
Overseer. *See* Overseers.
Partners. *See* Partner and Partnerships.
Servants. *See* Master and Servant.
Smugglers. *See* Bankrupt ; Smuggling.
Stock-Brokers. *See* Stock-Jobbing.
Trustees. *See* Trustees.

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[1] As the principal heads of this abridgment are arranged alphabetically, the points connected with this important title of commercial jurisprudence are necessarily inserted under their separate alphabetical divisions ; and it is, therefore, intended to confine the present note to a brief introduction to the law respecting debtor and creditor, viewed in conjunction, and generally without reference to any specific details.

A debt may be defined to be a sum of money, which appears to be due by the evidence of a court of record, or a sum due by recognisance, which is a sum of money recognised or acknowledged to be due to the Crown or a subject in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the doing, or forbearing to do, something, as upon the appearance of the party, or his good behaviour, or by mortgage, or by a sum due by certain and express agreement, as by a bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, or where the contract upon which the obligation arises is neither ascertained by a matter of record, nor by deed or special instrument, but by mere oral evidence, or arising out of securities unsealed.

It is difficult to state with precision what are the rights and remedies of debtors and creditors as against each other, upon principles of natural justice or equity. In the early ages of the republic of Rome, at a period when its ideas of commerce were extremely limited, we find the rights exercised by a creditor over his debtor to be marked with extreme severity. The cruelty of those laws has, indeed, been endeavoured to be extenuated by a modern civilian (Bynkershock), by the suggestion that, instead of the creditors being permitted to dismember and divide among themselves the *body* of their insolvent debtor, they divided, not in *fact* the *body*, but the *price* of his person. The authorities, however, are much too strong in favour of the literal acceptation, to enable us to draw the more humane but more metaphorical conclusion. *See* Montesquieu, *De l'Esprit de Loix*, liv. 12, c. 24. The harshness of these laws, however, in states but little polished, seems in a great degree to depend upon the importance and amount of the debts contracted. The severity, therefore, of the Roman law in this respect must, in a great degree, be attributed to the practice amongst the plebeians of accepting large loans of the higher orders, the payment of which, in a country where commerce was inconsiderable, could scarcely be expected to be enforced by any measures. But in countries where the subject of the debt was in general of small amount, confined, perhaps, in a great degree to the daily articles of traffic, the right of the creditor was much restricted. By the ancient law of France no person could be arrested or confined in prison on account of any private debt (*Ordonnances des Rois de France*, tom. i. p. 72, 80), a privilege which seems to have been extended to the other European states (Gudenus *Sylloge Diplom.* 473), and, as is observed by Robertson (*History of Charles V.*, Proofs and Illustrations, p. 304, 8vo. ed.) men had made some progress towards refinement before creditors acquired a right of seizing the property of their debtors, in order to recover payment. The most obvious species of security was, that the person who sold any commodity should receive a pledge from him who bought it, which he restored upon receiving payment. This appears to have been a very ancient species of security, as we find by the Jewish law a restriction on the creditor as to taking the nether or the upper millstone as a pledge ; " for he taketh

(B) *As to the Mode of Creating the relative Situation of Debtor and Creditor.*

(*a*) *Real Property.* See

Annuity	Lease	Rent
Common	Mortgage	Repairs
Covenant	Power	Replevin
Fixtures	Recognisance	Taxes
Frauds, Statute of	Release	Use and Occupation
Landlord and Tenant		

(*b*) *Personal Property.* See

Account stated	Corporation	Maintenance
Accounting, Action for not	Deceit	Master and Servant
Action	Distress	Money Had and Received
Apothecary	Election	„ Lent
Apprentice	Escape	„ Paid
Attorney	Exchange	Mortgage
Auction and Auctioneer	Executors and Administrators	Parent and Child
Bailment		Partner
Bank of England	Fisheries	Party Wall
Banker	Fixtures	Poundage
Bankrupt	Frauds, Statute of	Principal and Agent
Barrister	Freight	„ Surety
Bastard	Goods Bargained & Sold	Printer
Bills and Notes	„ Sold & Delivered	Proctor
Bottomry and Respondentia	Guarantee	Reward
	Indemnity	Salvage
Canal	Infant	Scotch Bond
Carrier	Innkeeper	Sheriff
Cheque, Bankers'	Insolvent Debtor	Ship and Shipping
Chose in Action	Insurance	Smuggling
Composition	Interest	Spirituous Liquors
Contribution	Joint-Stock Company	Stamps
Copyright	Landlord and Tenant	Stock

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a man's life to pledge." Deut. xxiv. 6; and *see* D'Achery's *Spicelegium*, ix. 185. By the ancient law of France, in the more advanced state of the country, when no pledge was given, and the debtor became insolvent or refractory, the creditors were permitted to seize his property by force, without the intervention of any process; and the citizens of Paris were warranted by royal mandate to seize him in any place, or in any mode, and mutually to assist each other for that purpose. *Ordonnances*, tome i. p. 16. Such a permission, however, as may naturally be supposed, gave rise to great oppression on the one hand and great disorders on the other; and in the year 1351 the ordonnance was issued which prohibited creditors from seizing the effects of their debtors, unless by warrant from a magistrate (id. ii. p. 438); and afterwards a regular provision was made for distraining the effects of a debtor; and if his movables were not sufficient to discharge the debt, his immovable property or his lands were rendered liable to be distrained, and even sold, for the benefit of his creditors. D'Achery, ix. p. 184, 185; id. xi. p. 348, 380.

It may be said in general, that the rights of the creditor over his debtor are, in this country, mild and humane. Specific instances, indeed, may and do occur, in which creditors have acted oppressively towards their debtors, and are supported in their conduct by the laws. On the other hand, great frauds are daily practised by the debtor by contracting debts which, according to common reason and prudence, there seemed to be no ground to suppose that he could ever discharge; sometimes, indeed, with a knowledge on the part of the creditor that the credit of his debtor was not good, and sometimes by the means of representations made by the debtor for the purpose of deceiving the creditor. The principal remedial laws on the part of the debtor are the bankrupt laws; for, according to their present effect and practice, they may be considered to be so, although not originally framed for that purpose. *See* vol. ii. p. 141.

Surveyor
Theatres
Tithes
Tolls
Trustees
Use and Occupation
Usury
Wages
Warranty
Witness
Work and Labour

(*c*) *As relates to Services.*

Agents. *See* Principal and Agent.
Apothecary. *See* Apothecary.
Apprentices. *See* Apprentice ; Master and Servant.
Arbitrator. *See* Arbitration.
Attorney. *See* Attorney.
Auctioneer. *See* Auction and Auctioneer.
Bail. *See* Bail.
Brokers. *See* Principal and Agent.
Carrier. *See* Carrier.
Counsel. *See* Barrister.
Executor and Administrator. *See* Executor and Administrator.
Factor. *See* Principal and Agent.
Guarantee. *See* Guarantee.
Husband and Wife. *See* Husband and Wife.
Infant. *See* Infant.
Messenger under Fiat in Bankruptcy. *See* Bankrupt.
Parish Officers. *See* Churchwarden ; Overseer.
Partners. *See* Partner and Partnership.
Printers. *See* Printers.
Proctors. *See* Proctors.
Servants. *See* Master and Servant ; Principal and Agent.
Sheriffs. *See* Sheriffs.
Sureties. *See* Bail-Bond ; Bills and Notes; Covenant; Guarantee; Principal and Surety.
Surveyors. *See* Surveyor.
Wharfinger. *See* Carrier; Wharfinger.
Witness. *See* Witness.

(C) *Of the Effect of the Creation of the relative Situations of Debtor and Creditor.* See

Account stated
Arrest
Bankrupt
Bills and Notes
Costs
Covenant
Cross Action
Deed
Distress
Execution
Extent
Foreign Attachment
Guarantee
Indemnity
Interest
Judgment
Lien
Outlawry
Partners
Principal and Agent
Transitu, Stopping in
Voluntary Conveyance

(*d*) *As regards the Discharge or Exoneration of the Debtor.* See

Accord and Satisfaction
Bankrupt
Composition
Estoppel
Execution
Executors and Administrators
Judgment
Lien
Limitation, Statute of
Payment
Receipt
Release
Set-Off

(D) *Relative to the Construction of Contracts between Debtor and Creditor, and of Void Conveyances.* *See* Composition with Creditors; Voluntary Conveyance.

DECEASED. *See* Witness.

DECEIT. *See* Cheating, *ante*, p. 95; *post*, Fraud ; Horses; Master and Servant; Warranty.

I. Definition of, p. 561.

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(D) *How Action limited by* 9 *Geo.* 4, *c.* 14, *s.* 6, p. 565.

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(A) *A Person professing to act as Agent for another impliedly warrants his authority to act*, p. 567.

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I. Definition of.[1]

II. When Action Maintainable.

(A) *For Fraudulent Representation occasioning Damage.*

Pasley v. Freeman, 3 T. R. 51.

A *fraudulent* representation occasioning damage to a third person is actionable, whether the party misrepresenting gain by it or not.[2]

In an action on the case in the nature of a writ of deceit. The plaintiff declared that the defendant did wrongfully and deceitfully encourage and persuade the plaintiff to sell and deliver to one F. divers goods upon trust and credit; and did, for that purpose, falsely assert and affirm to the plaintiff that F. then and there was a person safely to be trusted and given credit to, and did thereby falsely and deceitfully cause and procure the plaintiff to sell and deliver the said goods upon trust and credit to the said F.; and, in fact, the plaintiff, confiding in and giving credit to the assertion and affirmation of the defendant, did sell and deliver the said goods to the said F., whereas, in truth, the said F. was not then and there a person safely to be trusted and given credit to, which the defendant well

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[1] Deceit is a subtle trick or device, including every species of craft and collusion used to deceive or defraud another (*see* West, Symb. s. 68), as winning money at cards by false play (Moore, 776); or taking a false oath, whereby the plaintiff lost his office. 1 Lev. 119.

No mention is to be found of the writ of deceit until the reign of Edward II., though it was founded on the common law. This writ was applicable to the redress of any injury sustained by reason of collusive oppression, or deceitful proceedings in judicial matters. *See* 2 Reeves, E. L. 329.

[2] To support this action for deceit there must be an intention to defraud. *Tapp v. Lee*, 3 B. & P. 367. *Taylor v. Ashton*, 11 Mee. & W. 401. *Thom v. Bigland*, 8 Ex. 725; 22 L. J. Ex. 243. *Ashton v. White*, Holt, 387. *Gainsford v. Blachford*, 6 Price, 36; 2 Smith's *Leading Cases*, 4th ed. 62, n. Still, in order to prove such fraud as the law considers sufficient to maintain this action, it is only necessary to show that what the defendant asserted was *false* within his knowledge, and occasioned damage. *Foster v. Charles*, 6 Bing. 396; 7 id. 108. *Corbet v. Brown*, 8 id. 433. *Polhill v. Walter*, 3 B. & Ad. 122. And in the case of a sale of goods, the rule to be gathered from all the authorities is that, where the purchaser does not take a warranty, he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was based in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of *caveat emptor* applies, and the representation itself does not furnish a ground for action. *Ormrod v. Huth*, 14 Mee. & W. 651. *Evans v. Collins*, 5 Q. B. 804. *Shrewsbury v. Blount*, 2 Man. & G. 279. *Cornfoot v. Fowkes*, 6 Mee. & W. 358. But where the defendant does not believe the statement to be true the action will lie. *Evans v. Edmunds*, 13 C. B. 777. *Rawlins v. Hickham*, 28 L. J. Ch. 188. *Slim v. Croucher*, 29 id. 273. And the wilfully telling an untruth to induce a party to alter his condition, whereby he is induced to alter it, is a fraud in law, for which an action of deceit will

knew, and the said F. had not, or any other person on his behalf, paid to the plaintiff the value of the said goods; but, on the contrary, the said F. then was and continued unable to pay for the same, and averred that the defendant deceived the plaintiff in this; that the said F. was not a person safely to be trusted or given credit to in that respect, and that the defendant well knew the same, *per quòd* the plaintiff was deceived and imposed on. The plaintiff had a verdict, and, upon motion to arrest the judgment, the question was whether, admitting all the facts as stated to be true, the action could be maintained?

Per Kenyon, C. J., and Ashurst and Buller, JJ. "It is clear that an action cannot be maintained for telling a bare naked lie, but that we define to be saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat, or deceive another. Every deceit comprehends a lie, but a deceit is more than a lie on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person. But it was argued that the action lies not unless where the party making it has an interest, or colludes with one who has. We do not recollect that any case was cited which proves such a position; but, if there were any such to be found, we should not hesitate to say that it could not be law, for we have so great a veneration for the law as to suppose that nothing can be law which is not founded on common sense or common honesty. For the gist of the action is the injury done to the plaintiff, and not whether the de-

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lie (*Murray v. Mann*, 2 Ex. 538. *Atkinson v. Pocock*, 1 id. 796), and this although no injury was intended. *Watson v. Paulson*, 15 Jur. 1111. The action, however, will not lie if the person deceived have a full opportunity of ascertaining the correctness of such a statement, or an intimation of its truth being doubtful, as where it was stated that the commodity should be taken "with all faults." *Pickering v. Dowson*, 4 Taunt. 779.

It must also appear distinctly that the contract was entered into on the faith of the representation. *Shrewsbury v. Blount*, 2 Scott, N. R. 588.

Nor can the action be maintained unless it be shown that the alleged damage flowed directly from the misrepresentation complained of. *Collins v. Cave*, 30 L. J. Ex. 55. But an action lies against the secretary of an insurance company for false representations as to the management and affairs of the company, whereby the plaintiff was induced to insure, without showing that any positive damage has been sustained. *Pontifex v. Bignold*, 3 Scott, N. R.; 3 Man. & G. 63; 9 Dowl. P. C. 860.

It would appear, however, that though an action for deceit can be maintained against the seller for fraudulent representation, it is otherwise with the buyer; and in an action on the case for deceitful representations, whereby the plaintiff was induced to sell his interest in certain buildings, trade, and stock, at a less price than he otherwise would have taken, *Lord Ellenborough*, in delivering the judgment of the court, said: "To support the action there must be a fraud clearly alleged to have been committed by the defendant, and a damage resulting from such fraud to the plaintiff. The fraud must consist in depriving the plaintiff, by deceitful means, of some benefit which the law entitled him to demand or expect. A seller is unquestionably liable to an action of deceit if he fraudulently represent the quality of the thing sold to be other than it is in some particulars which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear making the inquiries which for his own security and advantage he would otherwise have made. But is a buyer liable to an action for deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case, or recognised principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequence of such reliance, therefore, he can maintain no action." See *Vernon v. Keys*, 12 East, 632; affirmed in error, 4 Taunt. 488. And no action will lie against husband and wife for a false representation by the wife that she was sole, whereby the plaintiff was induced to take her promissory note as a security for a loan to a third person. *Liverpool Adelphi Loan Association v. Fairhurst*, 23 L. J. Ex. 163; 9 Ex. 422. Nor can a fraudulent representation by an infant that he was of full age, whereby the plaintiff was induced to contract with him, be pleaded as a replication on equitable grounds to a plea of infancy to an action for goods sold. *Bartlett v. Wells*, 10 W. R. 229.

fendant meant to be a gainer by it. What is it to the plaintiff whether the defendant was or was not to gain by it? the injury to him is the same. In *Cooper v. Gardner*, Carth. 90, it was objected to a similar action that the declaration neither stated that the defendant deceitfully sold the goods in question, or that he knew them to be the property of another person; and a man may be mistaken in his property and right to a thing without any fraud or ill-intent. *Ex concessis*, therefore, if there were fraud or deceit the action would lie, and knowledge of the falsehood of the thing asserted is fraud and deceit; the cases show, that if there be fraud or deceit the action will lie, and that knowledge of the falsehood of the thing asserted is fraud and deceit. Collusion, then, is not necessary to constitute fraud. In the case of a conspiracy, there must be a collusion between two or more to support an indictment; but if one man alone be guilty of an offence which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. That knowledge of the falsehood of the thing asserted constitutes fraud, though there be no collusion, is further proved by the case of *Risney v. Selby*, where, upon a treaty for the purchase of a house, the defendant fraudulently affirmed that the rent was 30*l.* per annum, when it was only 20*l.* per annum, and the plaintiff had his judgment; for the value of the rent is a matter which lies in the private knowledge of the landlord and tenant, and if they affirm the rent to be more than it is, the purchaser is cheated, and ought to have a remedy for it. No collusion was there stated, nor does it appear that the tenant was ever asked a question about the rent, and yet the purchaser might have applied to him for information, but the judgment proceeded wholly on the ground that the defendant knew that what he asserted was false. And by the words of the book it seems that, if the tenant had said the same thing, he also would have been liable to an action. If so, that would be an answer to the objection that the defendant in this case had no interest in the assertion which he made. But we shall now leave this point on the dictum or inference which may be collected from that case. Some general arguments were urged at the bar to show that mischiefs and inconveniences would arise if this action were sustained; for, if a man who is asked a question respecting another's responsibility hesitate or be silent, he blasts the character of the tradesman; and if he say he is insolvent, he may not be able to prove it. But let us consider what is contended for: it is nothing less than that a man may assert that which he knows to be false, and thereby do an everlasting injury to his neighbour, and yet not be answerable for it. This is as repugnant to law as it is to morality. Then it is said that the plaintiff had no right to ask the question of the defendant. But we do not agree in that, for the plaintiff had an interest in knowing what the credit of it was; it was not the inquiry of idle curiosity, but it was to govern a very extensive concern. The defendant, undoubtedly, had his option to give an answer to the question, or not; but if he gave none, or said he did not know, it is impossible for any court of justice to adopt the possible inferences of a suspicious mind as a ground for grave judgment. We are, therefore, of opinion that this action is maintainable on the grounds of deceit in the defendant."

Per Grose, J. "Persons frequently draw different conclusions from the same premises; I, unfortunately, differ from the rest of the court. When this case was first brought before the court on motion for a new trial, I must confess I thought it reasonable that the action should lie; but, on looking into the old books for cases in which the old action of deceit has been maintained upon the false affirmation of the defendant, I have changed my opinion. The decisions on this head are brought together in Bro. tit. Deceit, pl. 29; and in Fitz. Abr. The present is an action against the defendant for making a false affirmation, or telling a lie respecting the credit of a third person, with intent to deceive, by which the third person was damnified; and for the damages suffered, the plaintiffs contend that the defendant is answerable in an action on the case. The principle on which it is contended to lie is, that whenever deceit

or falsehood is practised to the detriment of another, the law will afford redress: this proposition I intend to controvert, and shall endeavour to show that, in every case where deceit or falsehood is practised to the detriment of another, the law will not give redress; and I say that, by the law as it now stands, no action lies against any person standing in the predicament of this defendant for the false affirmation stated in the declaration. A variety of cases may be put: Suppose a man recommends an estate to another, as knowing it to be of greater value than it is; when the purchaser has bought it he discovers the defect, and sells the estate for less than he gave; why may not an action be brought for the loss founded upon the only principle that will support this action? And yet such an action has never been attempted. There are cases, I admit, where a man is bound not to misrepresent, but to tell the truth, but no such case has been cited, except in the case of contracts, and all the cases of deceit for misinformation may, it seems, be turned into actions of *assumpsit*. And so far from a person being bound in a case like the present to tell the truth, the books supply me with a variety of cases in which even the contracting party is not liable for a misrepresentation. None exists in which such an action as the present has been brought; none in which any principle applicable to the present case has been laid down to prove that it will lie—not even a *dictum*. But from the cases cited, some principles may be extracted to show that it cannot be sustained: 1st. That what is fraud which will support an action is matter of law; 2d. That in every case of a fraudulent misrepresentation attended with damage an action will not lie, *even between contracting parties;* 3d. That if the assertion be a nude assertion, it is that sort of misrepresentation the truth of which does not lie merely in the knowledge of the defendant, but may be inquired into; and the plaintiff is bound so to do, and he cannot recover a damage which he has suffered by his laches. Then, let us consider how far the facts of the case come within the last of these principles. The misrepresentation stated in the declaration is respecting the credit of F.; the defendant asserted that the plaintiffs might safely give him credit: but credit to which a man is entitled is matter of judgment and opinion, on which different men might form different conclusions, and upon which the plaintiffs might form their own opinion; to mislead which, no fact to prove the good credit of F. is falsely asserted. It seems to me, therefore, that any assertion relative to credit, especially where the party making it has no interest, nor is in any collusion with the person respecting whose credit the assertion is made, is like the case of *Harvey v. Young*, Yelv. 20, respecting the value of the term, where J. G., who had a term for years, affirmed to J. D. that the term was worth 150*l.*, to be sold, upon which J. D. gave 150*l.*, and afterwards could not get more than 100*l.* for it, and then brought his action; and it was held, that this matter did not prove any fraud, for it was only a naked assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion. I am, therefore, of opinion, that this action cannot be supported."—Rule discharged.

(B) *And such Representation need not be made directly to the Party injured.*

PILMORE v. HOOD, 7 Dowl. P. C. 136; S. C. 5 Bing. N. S. 97; S. C. 6 Scott, 827.

A. made a misrepresentation to B. about to purchase his business; B. not being able to do so, C. consented to stand in his place, to which A. con-

The declaration alleged that the defendant entered into an agreement with one A. B. for the sale of a lease of a public-house for a certain sum, and that, at and before the said agreement, the defendant falsely, fraudulently, and deceitfully pretended and represented to the said A. B. that the trade of the said house had been at the rate of 180*l.* per month, all retail over the counter; and the said A. B. not being able to complete the contract, it was agreed between the plaintiff, the defendant, and A. B., that the plaintiff should become the purchaser instead of A. B., and at and before the agreement A. B. communicated to the plaintiff the agreement and representation as to the value of the house made by the defendant to him, of which the defendant had notice, and

the plaintiff confiding in such representation agreed to become the purchaser of the premises for a certain sum, which he paid to the defendant. It was then alleged that the concern was not of the value represented by the defendant, as he well knew; and that by means of the premises the defendant falsely and fraudulently deceived the plaintiff in the sale, and thereby the premises were of little or no value.

sented:—*Held*, that C. might maintain an action for deceit against A.[1]

The court held, that the plaintiff might maintain the action, and that sufficient appeared to support it in the form adopted.

(C) *Plaintiff may waive Contract and bring Action for Deceit.*

DOBELL v. STEVENS, 3 B. & C. 624; S. C. 5 D. & R. 490.

In an action of deceit, it appeared that the vendor on the treaty for the purchase of the lease, good-will, &c. of a public-house, greatly misrepresented the profits of the trade and the rents of part of the premises, although the terms of the purchase were subsequently reduced into writing and the lease assigned.

The plaintiff may waive the contract, and bring an action for deceit.[2]

The court held, that the plaintiff was not bound to proceed on the contract, and that an action on the case might be maintained, and evidence of the defendant's assertions received, notwithstanding such written memorandum being collateral to the thing sold, and therefore not likely to be mentioned in the contract.

(D) *How Action limited by* 9 *Geo.* 4, *c.* 14, *s.* 6.

By 9 Geo. 4, c. 14, s. 6, it is enacted, "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon,[3] unless such representation or assurance be made in writing, signed by the party to be charged therewith."

By 9 Geo. 4, c. 14, the representation as to the credit, conduct, or character of a third party, must be in writing.

LYDE v. BARNARD, 1 Mee. & W. 101; S. C. 1 Tyr. & Gr. 250.

This was an action for a false representation by the defendant, that a settlement was charged only with specific annuities, whereby the plaintiff was induced to advance money upon an annuity secured by a further charge on such settlement.

And that statute applies to representations as to the sources from which payment is to be derived.[4]

Lord Abinger and *Gurney*, *B.* (*contrà*, *Parke*, *B.*, and *Alderson*, *B.*) held, upon the construction of the 9 Geo. 4, c. 14, that the representation not being

[1] So an action was held maintainable for falsely and fraudulently warranting a gun to have been made by Nock, and to be a good, safe, and secure gun, and selling it as such to the plaintiff's father, *for the use of himself and sons;* one of whom (the plaintiff), confiding in the warranty, used the gun, whereupon it burst, and injured him. This action was held to be maintainable. *Langridge v. Levy*, 2 Mee. & W. 519. And where the defendant and others, forming the board of management of a joint-stock company, for the purpose of getting the shares of the company inserted in the official list of the Stock Exchange, through their secretary, untruly represented that two-thirds of the scrip had been paid upon. The shares being, in consequence of that representation, inserted in the official list, the plaintiff, knowing the requirements of the Stock Exchange, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury having found that the representation was made fraudulently:—*Held*, that the defendant was liable to the damages sustained by the plaintiff, although the representation was not made to him directly. *Bedford v. Bagshaw*, 29 L. J. Ex. 59; 4 H. & N. 538. And the directors of a joint-stock company are liable for any fraudulent misrepresentation in the report of the financial condition of the company, issued by them for circulation to any person who is induced by such report to take shares in the company. *Scott v. Dixon*, 29 L. J. Ex. 62, n.

[2] *See* C. & P. 511. *Pearson v. Wheeler*, R. & M. 303. *Ormrod v. Huth*, 14 Mee. & W. 664.

[3] So in the original roll of parliament; probably a mistake for *thereupon*. See *Lyde v. Barnard*, 1 Mee. & W. 115.

[4] A referee stating that "you may safely lend A. B., I know he has property, the

made in writing could not be made the ground of an action, the term *ability*, in the statute, being applicable to the sources from which it is derived.

III. Where there is an Express Warranty.[1]

IV. „ „ Implied Warranty.[2]

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title-deeds are in my possession," is a representation within this statute. *Swan v. Phillips*, 3 Nev. & P. 447. And so, if made by a shopman authorised by the defendant for that purpose. *Haslock v. Fergusson*, 2 id. 269. And a representation made by a defendant that a firm, of which he was a partner, was trustworthy, is within the statute. *De Vaux v. Steinkeller*, 6 Bing. N. C. 84; 8 Dowl. P. C. 33. The fact of the representation not being in writing is to be taken advantage of under the general issue. *Turnley v. Macgregor*, 6 Man. &G. 46.

[1] Every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended (*Power v. Barham*, 4 Ad. & E. 473. *Shepherd v. Kain*, 5 B. & A. 240. *Freeman v. Baker*, 2 Nev. & M. 446); and no *scienter* need be alleged or proved. *Williamson v. Allison*, 2 East, 446. The difficulty is in ascertaining how it was intended, for if it turned out to be intended merely for a representation, no action is maintainable upon it unless it was false within the knowledge of the party making it. Thus, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant:—"Received of Mr. Budd 10*l.* for a grey four-year old colt, warranted sound in every respect." It was held at *nisi prius*, and afterwards by the court *in banc.*, that the warranty applied only to the soundness, and that the age was mere matter of description; and the plaintiff, who had sued as upon a warranty of the age, was nonsuited. See *Budd v. Fairmaner*, 8 Bing. 52.

And in all cases of an express warranty an action lies against the party making it, if the warranty prove false; as if a man sell cloth and warrant it of a particular length (*see* F. N. B. 98); or that a horse is sound (*see* 1 Roll. Abr. 96): in either of these or similar instances, if the cloth be not of the length represented, or the horse sound, the party deceived may support an action, although the warranty be only by parol (*see* F. N. B. 98); or he may use the breach of such warranty as evidence in reduction of the vendor's claim. *Street v. Blay*, 2 B. & Adol. 456. *Gompertz v. Denton*, 1 C. & M. 207. Such warranty must be made upon the sale. A mere affirmation of a matter of opinion at the time of the sale of any article will not subject the vendor to an action, although it may ultimately prove false, unless he knew, or had reason to believe at the time, that what he stated was a falsehood (1 Esp. N. P. C. 572); and a warranty will not be binding where the deception is apparent, or the falsehood of it known to the vendee; as if a man warrant a horse, with an obvious and visible defect, to be sound (*see* 10 Ves. jun. 507; Salk. 211); or cloth that is blue to be black (*see* Kitch. 174); if the vendee were capable of seeing; for in such cases, if he be deceived, it is his own fault, and the law will not give any remedy to a man for a loss arising from his negligence and want of proper caution. Hence, if a vendor affirm a horse to be sound wind and limb, whereupon a purchaser gives a certain price, if the horse prove to be blind an action will lie; but it will be good evidence on the part of the defendant to show that the defect was visible, for then it cannot reasonably be supposed that the affirmation extended to it. *See* Salk. 21. And the vendee may maintain an action against the vendor for fraudulent misrepresentation, after having paid the price of the goods, under legal process. *See* 2 Esp. 572.

Sale of Goods—Vendors and Purchasers—Warranty.—A warranty made after the sale without consideration is bad. 3 Bl. Com. 166. And no verbal statement previous to a sale by written contract can operate as a warranty. *Pickering v. Dowson*, 4 Taunt. 779. *Kain v. Old*, 2 B. & C. 627. *See* Horses; Sale of Goods; Vendor and Purchaser; Warranty.

[2] Where a custom is observed by a particular trade to specify defects in the sale catalogue, an omission of such a notification raises an implied warranty that the goods are exempt from defect, and an action lies for the deceit. As where stock sheep are understood, by the custom of the trade, to mean sound sheep, a sale of unsound sheep as stock is sufficient to support an action of deceit. *Jones v. Bowden*, 4 Taunt. 847.

Wherever a vendee suffers through the insufficiency of the title of the vendor, as when he has sold goods as his own over which he has no control, the vendee may recover a satisfaction from the vendor, though there may not have been any express warranty. *See* Show. 68; 3 Mod. 261. And it is a general rule, that the vendor cannot be made responsible by implication for the quality of the article sold, unless he expressly warrant it to be sound and good (*see* 1 Roll. Abr. Actions sur Case, P.; Dougl. 20; 2 East, 314; 3 Camp. 34); or knew it at the time to be otherwise, and had used any art to disguise or prevent a detection of the defect. *See* Cro. Jac. 4; Peake, N. P. C. 15. The maxim is, in such case, *Caveat emptor.* But this rule does not apply where the vendor has had no opportunity of inspecting them before or at the time of the sale; *à fortiori* it cannot apply to goods which are to be manufactured for the pur-

(A) *A Person professing to act as Agent for another impliedly warrants his authority to act.*

COLLEN v. WRIGHT AND OTHERS (EXECUTORS), 7 E. & B. 301; 3 Jur. N. S. 363; 26 L. J. Q. B. 147; in Error, 27 L. J. Q. 215; 8 D. & B. 647; 4 Jur. N. S. 357.

And a person who *bonâ fide*, and without authority, pretends to act as agent for another, and makes a contract on his behalf with a third party, impliedly warrants to such third party that he has authority to make the contract.[1]

This was a special case without pleadings. The facts were as follows:— In 1853 the plaintiff was desirous of obtaining a lease of a farm, situated in Soham Fen, in the county of Cambridge, belonging to one William Dunn Gardner. Robert Wright, deceased, was a land agent and valuer, residing at Norwich, and up to within a short time before the plaintiff's application to him, hereinafter mentioned, had had the management of the property of the said W. D. Gardner in and near Soham. The plaintiff, believing the said R. Wright still to have the management of the said property, and to be the general agent of the said W. D. Gardner, for the letting of the same, including the said farm in Soham Fen, applied to the said R. Wright, as the supposed agent of the said W. D. Gardner for a lease thereof, and after some negotiation between them, on the 21st of April, 1853, an agreement in writing was prepared by the said R. Wright, and signed by him as the agent of the said W. D. Gardner, and by the plaintiff. The agreement was set out, and was signed "Robert Wright, agent to William Dunn Gardner, Esquire.—John Collen." It was further agreed between the plaintiff and the said Robert Wright, that an agreement, stating in detail the terms referred to in the agreement, should be prepared without delay, and be signed by the parties. And on the 22d of April, 1853, the plaintiff, on the faith of the signature of the said agreement by the said R. Wright as above set forth, took possession of the farm in question. On the 31st of May, 1853, an agreement in writing for a lease, which the said R. Wright brought with him, stating the terms in detail, was signed by him and the plaintiff as follows:—

"Witness our hands this 31st day of May, 1853. Robert Wright, agent to William Dunn Gardner, Esquire. Lessor, John Collen. Witness, Thomas Hustwick."

On the 1st day of June, 1853, a valuation of the straw and muck on the said farm was made in accordance with the said agreement, and the amount thereof was paid by the plaintiff to Robert John Wright, the son and partner of the said R. Wright, and was by said R. J. Wright paid into the bank of Messrs. Eaton and Hammond, the bankers of the said W. D. Gardner, to the credit of his the said W. D. Gardner's account there. The plaintiff, after he took possession of the said farm, and before the month of September, 1853,

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chaser. *See* 4 Camp. 144; id. 169; 1 Stark. 504, 384; 6 Taunt. 108; 4 B. & C. 111, 112, 114; 6 D. & R. 203; 4 B. & C. 115. *See* 6 D. & R. 208. And if a person sell a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose (*Jones v. Bright*, 5 Bing. 533. *Brown v. Edgington*, 2 Man. & G. 279. *Shepherd v. Pybus*, 3 id. 868); and in every contract to furnish manufactured goods, a warranty is implied that they shall be of a merchantable quality. *Stancliffe v. Clarke*, 7 Ex. 439. *Bull v. Robison*, 10 Ex. 342. A sale of goods by sample is such a warranty, that if the bulk do not accord with the sample the purchaser is not bound to accept or pay for the goods on any terms, although no fraud was intended on the part of the vendor (*see* 1 Camp. N. P. C. 113); though upon a sale of goods by sample, with a warranty that the bulk of the commodity answered the sample, the law will not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and, therefore, if there be a latent defect then existing in it unknown to the vendor, and without fraud on his part, such vendor is not answerable, though the goods may ultimately turn out to be unmerchantable. See *Parkinson v. Lee*, 2 East, 314. *Budd v. Fairmaner*, 8 Bing. 48. And the law will never imply a warranty where there is an express contract as to the nature and quality. *Dickson v. Zizinia*, 10 C. B. 602.

[1] *Randall v. Trimen*, 18 C. B. 786; 25 L. J. C. P. 307. *Lewis v. Nicholson*, 18 Q. B. 509; 21 L. J. Q. B. 311. *Richardson v. Dunn*, 36 L. J. C. P. 44.

relying upon the said agreements, and believing that the said R. Wright had authority to make and sign the same as the agent of the said W. D. Gardner, and that a lease would be granted in accordance therewith, expended a considerable sum of money in the cultivation and improvements of the said farm. On the 16th of November, 1853, the plaintiff was informed, as was the fact, that the said W. D. Gardner refused to sign the said lease, on the ground that the said R. Wright was not authorised to let the said farm for twelve years, or on the terms set forth in the said agreements. And the plaintiff, shortly afterwards, believing that the said R. Wright was duly authorised by the said W. D. Gardner to sign the said agreement, as his agent and on his behalf, instituted a suit in the Court of Chancery against the said W. D. Gardner for the specific performance of the said contract, and for a decree that the said W. D. Gardner might execute and deliver to the plaintiff a lease according to the terms thereof; which suit came on to be heard the 29th of February, 1856, before the Master of the Rolls, and judgment was pronounced therein, that the plaintiff's bill should be dismissed without costs, upon the ground that the said R. Wright had no authority from the said W. D. Gardner to sign the said agreements, as his agent or on his behalf. After the said suit had been commenced, and the said W. D. Gardner had put in his answers to the plaintiff's bill therein, from which it appeared that the said W. D. Gardner defended the suit upon the ground that the said R. Wright had no authority from him to sign the said agreements as his agent, the plaintiff, on the 7th of April, 1855, and before the hearing of the said suit, caused the said R. Wright to be served with a notice, informing him of Gardner's refusal to execute the lease and the proceedings in Chancery, and notifying that he should proceed in the suit at the risk of Wright, and that if the bill should be dismissed he should commence an action against him to recover the damages he had sustained, and the costs of the proceedings in Chancery. To this notice Wright, by his attornies, replied that he would defend any action which the plaintiff might bring against him.

For the purposes of this action it was to be taken as admitted, that the said R. Wright was not authorised by the said W. D. Gardner to sign the said agreement, or either of them, as his agent or on his behalf, or to let the said farm for the period or on the terms specified in the said agreements, and that neither of the said agreements was in law binding upon the said W. D. Gardner. The said R. Wright, however, *bonâ fide* believed, at the time when he signed the said agreements, that he was so authorised. The plaintiff has always been willing to perform the said contract on his part, and has done all things which it was necessary for him to do in order to entitle him to have the same performed. The said R. Wright died in the month of January, 1856, leaving the defendants his executrix and executors, and on or about the 22d of March, 1856, the plaintiff received from the said W. D. Gardner a notice to quit the said farm on the 29th of September next, or at the expiration of the current year of his tenancy; and the plaintiff has since quitted the said farm in pursuance of such notice.

The court of Queen's Bench decided that an action lay against the personal representatives of R. Wright to recover the damage sustained by the plaintiff, and also the costs of the unsuccessful Chancery proceedings. This judgment was afterwards affirmed in error by *Willes, J.*, in delivering the judgment of the majority of the court, as follows:—"It appears to me that the judgment of the Queen's Bench ought in all respects to be affirmed. I am of opinion that a person who induces others to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages he sustains by means of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the

moral character of his act; but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract, upon the faith of his being duly authorised, that the authority he professes to have does in point of fact exist. With regard to the amount of damages I retain the opinion thrown out in the course of the argument, that all the expenses sought to be recovered were occasioned by the assertion of authority made at the time of the contract, being continued and persisted in by the defendant, and *bonâ fide* acted upon by the plaintiff."

V. Extent of Responsibility incurred by Misrepresentation.

De Graves v. Smith, 2 Camp. 533.

The person making the misrepresentation is not liable beyond the value of the goods furnished on the faith of the representation.

The plaintiff inquired *generally* of the defendant concerning the circumstances of A.: the defendant made a deceitful representation; but the goods which A. was in contemplation to sell when the representation was made having been paid for, it became a question, whether the defendant was liable for the other goods subsequently sold, A. having become insolvent?

Per Lord Ellenborough, C. J. "To say, in ordinary cases, that the person who gives a representation of the credit of a third person shall be liable for other parcels of goods afterwards furnished to him, would be to make the representer a continuing guarantee, and to repeal the Statute of Frauds. I therefore think the defendant's liability must be confined to the parcel of goods then in contemplation to be sold. It would be different if the inquiry had been made with reference to accepting the party as a general customer."

VI. Counterfeiting Trade Marks.

Blofeld v. Payne, 1 Nev. & M. 353; S. C. 4 B. & Adol. 410.

Making artic es exactly resembling those sold by another, though not inferior, renders the party liable to an action of deceit.[1]

In an action on the case the declaration stated, that the plaintiff was the patentee of a metallic hone, which he used to wrap up in certain envelopes, and complained that the defendant sold hones wrapped up in papers similar to those of the plaintiff's, in consequence whereof the plaintiff was prevented from selling so many of his hones, and the hones of the plaintiff were deteriorated in character from the hones of the defendant being of an inferior quality. The jury negatived the fact of the hones being of an inferior quality. But on a verdict for the plaintiff for nominal damages,—

The court held it was immaterial as to the quality of the hones, as the gist of the action was the fraud, as selling the defendant's hones wrapped up in paper belonging to or made to imitate those of the plaintiff.

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[1] In case for using the plaintiff's particular mark on goods and selling them as manufactured by the plaintiff, it is enough to prove that the defendant sold them to retail dealers, for re-sale by them as the plaintiff's manufacture, and that the retailers did so re-sell them, although the dealers, who bought of the defendant, knew by whom they were really made. *Sykes v. Sykes*, 3 B. & C. 541. *Crawshay v. Thompson*, 4 Man. & G. 357, 380. As there is no abstract right of a tradesman to appropriate marks, there must be an intention to deceive, and to make the goods pass as his; and the questions for the jury are:—Is the resemblance so done as to deceive ordinary persons? Was the mark adopted by defendant with that intent, and in order to supplant the plaintiff's goods? Were they, in fact, sold as the plaintiff's goods? If the jury find in the affirmative, no special damage need be proved. *Rogers v. Nowill*, 5 C. B. 109. *Crawshay v. Thompson, supra.*

DIXON v. FAWCUS, 30 L. J. Q. B. 137; 9 W. R. (C. L.) 414.

And if A. fraudulently induce B. ignorantly to counterfeit the trade marks of C., B. may recover against A. the damage he incurs in so doing.[1]

Declaration that the plaintiff had agreed with the defendant to manufacture for him certain fire-bricks according to the directions of the defendant; that the defendant directed him to mark the said bricks with the word "Ramsey," knowing that one G. H. Ramsey was a manufacturer of fire-bricks, and sold his said bricks marked with the word "Ramsey;" and that the way in which he directed plaintiff to mark his said fire-bricks would amount to a piracy of the trade mark of the said G. H. Ramsey; that plaintiff, being ignorant of the rights of "Ramsey," marked the bricks as directed, and delivered them to the defendant; that Ramsey thereupon filed a bill in Chancery, which plaintiff compromised.

On demurrer it was held, that as the Court of Chancery would have granted an injunction in a case like the present, notwithstanding the plaintiff had innocently counterfeited the marks, the action was maintainable.

VII. THE FORM OF ACTION.[2]

DECLARATION.[3] *See* Pleading.

I. OF THE PARTIES TO.

(A) *The Form of Action and Subject-matter.* See

Account, Action on	Dower	Money Lent
Action	Ejectment	„ Paid
Adultery	Escape	Nuisance
Arbitration	Frauds, Statute of	Party Wall
Assault and Battery	Freight	Patent
Assumpsit	Game	Penal Statute
Bills and Notes	Gaming	Replevin
Bond	Goods Sold and Delivered	Seduction
Bribery	Guarantee	Ship and Shipping
Charter-party	Imprisonment	Slander
Common	Insurance from Fire	Tithes
Contract	„ on Lives	Trespass
Copyhold	„ Marine	Trover
Copyright	Judgment	Use and Occupation
Covenant	Landlord and Tenant	Usury
Deceit	Libel	Wager
Detinue	Malicious Arrest	Waste
Distress	„ Prosecution	Way
	Money Had and Received	

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[1] *Millington v. Fox*, 3 Mylne & C. 338. *Perry v. Truefit*, 6 Beav. 66. *Blanchard v. Hill*, 2 Atk. 484.

[2] Where no warranty exists in the contract, but the action is founded on fraudulent representation, the action should be framed in case on such fraud. *Ormrod v. Huth*, 14 Mee. & W. 651. Alleging a *scienter*. *Freeman v. Baker*, 5 B. & Adol. 797. *Pasley v. Freeman*, 3 T. R. 51. Where there is an express or implied warranty, the declaration may be framed either upon the contract or the wrong, but the *scienter* is immaterial. *Williamson v. Allison*, 2 East, 446. *Brown v. Edgington*, 2 Man. & G. 279.

The pleas will of course be regulated by the form of the declaration.

[3] The word declaration is derived from the Latin word *declaro*, and signifies that part of the pleadings in which the plaintiff or complaining party describes or states, in a methodical and legal form, his complaint or cause of action against the defendant or adversary. In a real action, it is more properly called a count; in a personal one, a declaration. The latter, however, is now the general term, being applied indiscriminately to real and personal actions. The nature of it may be further illustrated by stating, that it corresponds with the bill in a suit in a court of equity, and the libel of the civilians.

(B) *The Particular Character or Capacity of the Party.* See

Alien
Attorney
Auctioneer
Bail
Bankrupt
Carrier
Corporation
Executors and Administrators
Infant
Inn
Insolvent Debtor
Justice of the Peace
Lunatic
Master and Servant
Overseers
Parties to Actions
Partners
Principal and Agent
„ Surety
Sheriff
Trustee
Witness

II. Of the Form of Action.

(A) *Actions* ex Contractu. *See* Account; Assumpsit; Covenant; Debt; Detinue.
(B) *Actions* ex Delicto. *See* Case; Ejectment; Replevin; Trespass; Trover.

III. Time of Declaring, p. 572.

(A) *After Appearance*, p. 572.
(B) *If no Appearance within Eight Days*, p. 572.
(C) *In what Time Plaintiff must Declare*, p. 572.
(D) *Effect of Declaring too Soon or too Late*, p. 572.
(E) *Obtaining Time to Declare*, p. 572.

IV. Indorsements on, p. 572.

V. Delivering and Filing the Declaration, p. 573.

VI. Irregularities in. *See* Irregularity; Setting Aside Proceedings; Waiver.

VII. Amendment of. *See* Amendment, vol. i. p. 328.

VIII. Declaring against Prisoner. *See* Prisoner.

IX. Declaration, Form and Requisites of. *See* Particulars of Demand; Pleading.

X. Statement of Cause of Action in Particular Actions. *See*

Account Stated
Arbitration and Award
Assault and Battery
Assumpsit
Attorney
Bail
Bankrupt
Bills and Notes
Bond
Bottomry and Respondentia Bond
Bribery
Carriers
Case, Action on
Charter-party
Churchwarden
Common
Contract
Copyhold
Copyright
Corporation
Covenant
Damages
Debt, Action of
Deceit
Detinue
Distress
Dower
Ejectment
Escape
Excise and Customs
Executor and Administrator
Extortion
Fish and Fishery
Freight
Frauds, Statute of
Game
Goods Bargained and Sold
„ Sold and Delivered
Guarantee
Hundred
Husband and Wife
Imprisonment
Infant
Innkeeper
Insolvent Debtor
Insurance, Marine
„ on Life
„ from Fire
Interest
Judgment
Landlord and Tenant
Lease
Libel
Malicious Arrest
„ Prosecution
Master and Servant
Mesne Process
Money Had and Received

Money Lent	*Quare Impedit*	Stock
„ Paid	*Qui Tam*	Tolls
Nuisance	Rent	Trespass
Partners	Replevin	Trover
Party Wall	Writ, Right of	Use and Occupation
Patent	Seduction	Wager
Penal Statutes	Sheriff	Waste
Post-horse Act	Ship and Shipping	Watercourse
Principal and Agent	Simony	Way
„ Surety	Slander	

III. Time of Declaring.

(A) *After Appearance.*[1]

(B) *If no Appearance within Eight Days.*[2]

(C) *In what time Plaintiff must Declare.*[3]

(D) *Effect of Declaring too Soon or too Late.*[4]

(E) *Obtaining Time to Declare.*[5]

IV. Indorsements on.

Notice to plead is usually indorsed on the declaration, though it may be delivered separately.[6]

By C. L. P. Act, 1852, s. 63, "in cases where the defendant is within the jurisdiction, the time for pleading in bar, unless extended by the court or a judge, shall be eight days, *and a notice requiring the defendant to plead thereto* in eight days, otherwise judgment may, whether the declaration be delivered or filed, *be indorsed upon it*, or delivered separately."

[1] After appearance, plaintiff may declare at any time (except between the 10th day of August and the 24th day of October), and this even though the eight days allowed for appearance have not expired. *Morris v. Smith*, 2 C., M. & R. 314; 4 Dowl. 198. But he cannot declare while any injunction or order to stay proceedings is pending. C. L. P. Act, s. 26.

[2] If writ not specially indorsed, and defendant do not appear in the time required, "the plaintiff may, on filing an affidavit of personal service of the writ of summons, or a judge's order for leave to proceed, &c., and a copy of the writ of summons, file a declaration, indorsed with notice to plead, &c." C. L. P. Act, 1852, s. 58. If the writ be specially indorsed no declaration is required. Id. s. 27.

[3] If the plaintiff do not declare within the term next after the entry of the appearance, whether such entry be in term or vacation, judgment of *non pros.* may be signed against him after a four days' notice requiring him to declare. C. L. P. Act, 1852, s. 53. *Foster v. Pryme*, 8 Mee. & W. 664; Ch. Arch. 203. And by C. L. P. Act, 1852, s. 58, "a plaintiff shall be deemed out of court, unless he declare within one year after the writ of summons is returnable;" not "four terms." *Chaplin v. Showler*, 18 L. J. Ex. 34. This year is calculated from the day of the service of the writ. *Hodyson v. Mee*, 5 Nev. & M. 302; 3 Ad. & E. 765. *Barnes v. Jackson*, 3 Dowl. 404. And although, as has been seen, the plaintiff cannot declare during the pendency of a rule to stay, &c, or of an injunction, or between the 10th day of August and the 24th day of October, such portion of time will be reckoned as part of the year. *Horne v. Tooke*, 2 M. & Scott, 183; 2 Dowl. 776. If there are several defendants, the plaintiff cannot deliver a declaration against one and afterwards against the others. *Morton v. Grey*, 9 B. & C. 544. *Knight v. Parker*, 2 W. Black. 759. If he be in a position to declare against one or some, and not against the others, he should apply to a judge for further time to declare. *Morton v. Grey*, *supra*. *Williams v. Mainwaring*, Barnes, 401. But if he entirely drop his proceedings against the others, he may declare against one or some of them, subject to a plea in abatement. *Evans v. Whitehead*, 2 M. & Rob. 736; Ch. Arch. 204. It would seem that in a cause removed from an inferior court, the year for declaring would count from the date of the removal into the court above. *Morrish v. Richards*, 5 Nev. & M. 268; 1 Har. & W. 437.

[4] Declaring too soon is an irregularity (Ch. Arch. 205). For effect of not declaring, *see ante*, n. 3. *See post*, Irregularity; Waiver.

[5] By r. 7, H. T. 1853, "no side-bar rule for time to declare shall be granted." The mode now of obtaining further time to declare is to apply to a judge at chambers.

[6] If the notice be indorsed on the declaration the form is—

V. Delivering and Filing the Declaration.[1]

DECLARATIONS. *See* Dying Declaration.

DECLARATIONS and Affirmations in Lieu of Oaths. *See* Affirmation, vol. i. p. 265; Oaths; Perjury.

DE CONTUMACE Capiendo. *See* Church Rates, *ante*, p. 113. This is a writ for taking a contumacious person. It issues out of the Court of Chancery, in cases where a person has been pronounced by an ecclesiastical court to be contumacious and in contempt. Shelford, Marr, & Div. 494, 496, and notes. It is a commitment for contempt. Id. 504, 505. *See* 5 Ad. & E. (N. S.) 335.

Regina v. Thorogood, 3 Per. & D. 629.

On a rule to show cause why a writ *de contumace capiendo* should not be set aside—

The court held, 1st, that it was no objection to the *significavit*, under the 53 Geo. 3, c. 127, that it did not state on the face of it that it was issued within ten days of the contumacy, as is required by sect. 1, as no such statement appears in the form given in the schedule; 2dly, that the writ *de contumace capiendo* is not void on the ground that it contains no addition of the defendant; and 3dly, that it was no objection to the form of the proceedings in the Ecclesiastical Court, "in a matter of the subtraction of church-rates," that it did not appear on the face of it what the amount of the rate demanded was, or that the "validity" of the rate was in question, though the act gives jurisdiction to a justice, where the sum is under 10*l.* and the validity of the rate not in dispute; because, as, before the passing of the above act, the Ecclesiastical Court had jurisdiction in all matters of church-rates, it is for the defendant to show that his case is within the exception.

Under the 53 Geo. 3, the *significavit* need not state it was issued within ten days after the party was in contempt; nor need the writ state the party's addition; and, if in an ecclesiastical suit for church-rates, need not allege the amount to exceed 10*l.*[2]

"The defendant is to plead hereto in eight days, otherwise judgment."

When delivered separately, the form is—

In the [*name of court.*]

Between A. B. plaintiff,
and
C. D. defendant.

The defendant is to plead to the declaration herein in eight days, otherwise judgment.

To Given, &c.

If the notice leave the number of days in blank, or give less time than the party is entitled to, it is an irregularity (*Braty v. Baldock*, Barnes, 302); but if not set aside, the defendant must plead in the proper time from its date. *Hifferman v. Langelle*, 2 B. & P. 363. *Collins v. Rose*, 5 Mee. & W. 194. If the notice mention more time than the defendant is entitled to, he may avail himself of the extension. *Solomonson v. Parker*, 2 Dowl. 405. Besides this notice, the declaration is indorsed with the name of the court, the name of the cause, the word "declaration," and the name of the attorney for the plaintiff.

[1] When the defendant has appeared, the declaration must be delivered to the defendant personally if he have appeared in person, and otherwise to his attorney (Ch. Arch. 212) before seven p.m., except on Saturday, and then before two p.m. Rule, E. T. 1856.

If the defendant have not appeared, the declaration must be filed in the master's office, indorsed with a proper notice to plead. C. L. P. Act, s. 58, *ante*, p. 572, n. 2. It must be filed even if defendant has been taken on a *capias*. *Neale v. Smoulten*, 2 C. B. 322. No notice of filing is requisite unless specially ordered by a judge. *Goodliffe v. Neaves*, 21 L. J. Ex. 338.

[2] The interval of a term between the return of the *de contumace* and the *capias cum proclamatione* renders the latter irregular. *Reg. v. Ricketts*, 1 Per. & D. 150. The writ should be directed to the sheriff of the county of which the party is described in the *significavit*. *Rex v. Ricketts*, 1 Nev. & P. 680. To describe the defendant as "now or heretofore of the parish of A., in the county of, &c.," is bad. *Rex v. Hewitt*, 5 Dowl. P. C. 646; S. C. 1 Nev. & P. 689. The *significavit* of contumacy by the surrogate, in a suit before him, is irregular. *Reg. v. Jones*, 10 Ad. & E. 576. A writ *de contumace capiendo* will not be quashed on a mere suggestion that the sentence in the spiritual court was invalid in part. *Kingston v. Hack*, 3 Nev. & P. 3.

DECOY.

KEBLE v. HICKRINGILL, 11 Mod. 74; S. C. Holt, 14; S. C. 3 Salk. 9.

A wilful disturbance of an ancient decoy, as by firing so near as to frighten away the birds, is actionable.[1]

In an action on the case for shooting at and disturbing wild ducks from coming to the plaintiff's decoy-pond, without coming on his soil, the question arose whether this was such a damage as to support an action.

Holt, C. J., said, "a decoy is a benefit to the possessor, and in nature of a trade, and the same reasons apply as to his being repaired in damages for an injury to his decoy as for any other trade. It is true, there may be a damage without injury, as where a man sets up the same trade as mine in the same town. But disturbing the wild ducks coming to the plaintiff's decoy is the same as disturbing him in the exercise of his trade. It was unnecessary for the plaintiff to set forth the exact number of ducks, one of the exceptions taken at the bar, because it was impossible. The statute 25 Hen. 8, c. 17, enumerates what is to be deemed wild fowl, so that the law takes notice of wild fowl. The present case differs from that of franchises, and from that in 5 Co. about taking fishes out of a pond, for that was an action of trespass to recover damages for the thing stolen, and it was necessary to set out the precise number, and of what kind; but this is an action of a trespass on the case to receive a recompense for a consequential damage or injury; and is for hindering the plaintiff from exercising his private right."

DECREE in Equity.[2]

I. How Enforced, p. 574.
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I. How Enforced.

Mode of enforcing.[3]

By 1 & 2 Vic. c. 110, s. 18, "all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity

[1] And this although no birds be destroyed. *Carrington v. Taylor*, 2 Camp. 258; 11 East, 571; 3 Salk. 9; 11 Mod. 74; Holt, 14; 1 Roll. 60, 61; 22 Hen. 6, c. 14, s. 15; 11 Hen. 4, c. 47; 29 Edw. 3, c. 11; 9 Hen. 7, c. 8; 25 Hen. 8; F. N. B. 86; 9 Rep. 43.

[2] This is a term usually applied to the judgment of a court of equity.

[3] Decrees and orders of the courts of equity are enforced under the above enactment by process sued out of those courts, and not out of the courts of common law, and the equity judges have framed writs for the purpose under the 1 & 2 Vic. c. 110, s. 20. *Stanford v. Robinson*, 3 Man. & G. 407; 4 Scott, 23; Forms, 1 Beav. 51. And no action will lie for money ordered to be paid by a decree. *Carpenter v. Thornton*, 3 B. & A. 52. But see *Biddell v. Dowse*, 9 D. & R. 413. *See* also *Emerson v. Lashley*, 2 H. Black. 248. *Smith v. Whalley*, 2 B. & P. 484.

A decree in equity for a thing for which a common-law action lies is no bar to a common-law action. *Carne v. Moye*, 2 Sid. 121. *Former v. Moltram*, 7 Scott, N. R. 408.

with respect to matters therein depending, and by the Lord Chancellor in the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

II. Operation as a Charge.[1]

III. Will not affect Lands till Registered.

Decrees not to affect lands till registered.[2]

By 1 & 2 Vic. c. 110, s. 19, "*No decree or order in any court of equity*, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall, by virtue of this act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless registered as therein mentioned."

By 18 & 19 Vic. c. 15, s. 2, the above provisions of the 1 & 2 Vic. c. 110, are extended to the Common Law Palatinate Courts and the Court of Chancery of Durham.

IV. How Proved.[3]

V. Secondary Evidence of.[4]

VI. When and between whom it is Evidence.[5]

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[1] The chief clerk's certificate, finding money to be due to a party, though adopted by the judge, is not an order for payment of money within the above section, so as to make the sum found due to carry interest. *Earl Mansfield v. Ogle*, 4 De Gex & J. 38. And a decree directing payment to the credit of a cause does not constitute a plaintiff a judgment creditor of the defendant under this section. *Ward v. Shakeshaft*, 8 W. R. 335. A party who has obtained a decree for an account of what is due to him, and payment of what shall be found due, cannot, pending the account, obtain a charging order, under the 1 & 2 Vic. c. 110, s. 18, on the property of the defendant, such a decree not being a decree for the payment of money within the meaning of that section. *Chadwick v. Holt*, 2 Jur. N. S. 918; 26 L. J. Ch. 76.—L. J.

[2] See *Lee v. Green*, 25 L. J. Ch. 269, and *post*, Registration.

[3] A decree in Chancery may be proved by an exemplification; or by an examined copy; or by production of a decretal order on paper, together with proof of the bill and answer, where such proof may be necessary. *Trowel v. Castle*, 1 Keb. 21; Bull.N.P. 244. And the bill and answer need not be proved if they are recited in the decree. Id. Com. Dig. Evid. c. 1; Accord. *Wharton Peerage*, 12 Clark & Fin. 295. The rule would appear to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact (as that a decree was made by the court), he ought regularly to give in evidence the proceedings on which the decree is founded. 1 Phil. Evid. 373; and *see* Peake, Evid. 74. *Hewett v. Piggott*, 5 C. & P. 75. Still, if the decree or order itself contain all the facts required, it has been held unnecessary to produce the bill and answer, though it is otherwise where it is material to show the particular issue raised. *Blower v. Hollis*, 1 C. & M. 396.

[4] So, a copy of an old decree in Chancery, establishing certain customs as against the lord of the manor, found among the muniments of his successor, is admissible as secondary proof of the decree as against the successor, for the place of deposit is evidence that the lord treated it as a true copy. *Price v. Woodhouse*, 3 Ex. 616. But it is not evidence that the lord admitted the facts stated in the decree to be true; if it was, the copy would be primary evidence. (S. C.) So, where the lord had delivered an old office copy of the decree as proving the customs of the manor, and the copy was lost, secondary proof of the lost copy (after search for the original) was admitted to prove the customs. (S. C.)

[5] A decree in equity may be given in evidence between the same parties, or any claiming under them (Bull.N.P.243), of every fact stated, whether by way of assertion or denial. *Percival v. Carey*, 4 De Gex & J. 610. It is even evidence as against parties not privy to it for some purposes. Thus, on a trial touching the title to land, decrees between former litigants were admitted for the defendant to show how, and in what character, he came into possession under them, although the plaintiff did not claim under any party to the suits. *Davies v. Lowndes*, 1 Bing. N. C. 606; S. C. on error, 6 Man. & G. 471. So it is evidence where hearsay is admissible. Thus, a decree in favour of a public officer, founded on an issue, is evidence of the right to exercise an office, and by such evidence the deputy oyster-meters of London established their exclusive rights within the port of London. *Laybourn v. Crisp*, 4 Mee. & W. 320. And a decree for

DE DONIS, Statute of. *See* Tail, Estates in.

DEDUCTION. *See* Principal and Agent; Set-Off; Sheriff.

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payment of tithe in kind, in a suit by the incumbent against the *occupiers* of land who set up a district *modus*, is evidence, but not conclusive evidence, for him in a feigned issue (under 6 & 7 Wm. 4, c. 71) between him and the landowners to try a manorial *modus*. A decree against the lord of a manor establishing a custom, is evidence against a succeeding lord. *Price v. Woodhouse*, *ante*, 575, n. 4.

END OF VOL. III.

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